

No. 15789 ✓

United States
Court of Appeals
for the Ninth Circuit

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, Appellants,

VS.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and WIL-
LANE HESTER HAYNES, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division

FILED

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PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Northern Division

No. 7102

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, Individuals,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, HARVEY V. HIGLEY, as Administrator of Veterans Affairs and his Successors in Such Office as Such, FRANCES SHENK HESTER, Also Known as FRANCES SHENK HESTER GARDNER, and WILLANE HESTER HAYNES,
Defendants.

COMPLAINT

Plaintiffs complain of defendants, and for causes of action allege:

First Cause of Action

I.

That Harvey V. Higley is a duly appointed, qualified and acting Administrator of Veterans Affairs of the Veterans Administration, an independent agency of the United States of America, and that the United States of America is a sovereign nation.

II.

That a contract of National Service Life Insurance was entered into by and between William E.

Gardner, Jr., deceased, and the United States of America on the 1st day of December, 1942; that said contract was evidenced by National Service Life Insurance Certificate #N7,745,410; that said contract of insurance was renewed and said renewal was evidenced by policy #V-12,207,555.

III.

That the said William E. Gardner, Jr., fully and faithfully performed all of the covenants and conditions required of him by the contract evidenced by the said certificate and policy.

IV.

That the said William E. Gardner, Jr., died on the 16th day of March, 1952; that upon the said date of his death, the said contract of insurance was in full force and effect.

V.

That as a result of the death of the said William E. Gardner, Jr., the proceeds of the said contract of insurance became due and payable to his properly designated beneficiaries as provided by law.

VI.

That on or about the 14th day of September, 1950, under the provisions of the said contract of insurance, the said William E. Gardner, Jr., deceased, designated George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, as the sole and principal beneficiaries thereunder, share and share alike.

VII.

That on the 14th day of September, 1950, when the said George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, were designated the beneficiaries under said contract of insurance, the said William E. Gardner, Jr., wrote a letter addressed to the said George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, in words and figures as follows:

“P. O. Box 1318
Palo Alto, Calif.
Sept. 14, 1950

Dear Helen & Bob,

I'm enclosing a copy of the change of insurance benificery that I just mailed into 49 - 4th St., The Veterans Administration, S. F.

The same witness signed both the copy sent in and this one being sent to you.

Just keep it for your own reference, if you would ever need it. There is no reason for any question of feelings in why I'm doing this.

I liked the way you presented yourselves as a real brother and sister with my two boys when I was over this last Saturday. I was mighty proud of you.

It really helped my inner self. Made me happy.

I realize that the insurance written your way would mean that you would be careful in it being spent for them. I know you would really have a thought for them in every way practical.

Just keep this to ourselves and thanks a million.

I'll probably be over to Sacto. around the 5th of Oct.

Love,

Bill."

VIII.

That as a result of the designation of beneficiaries as described in VI and VII above, the designees George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, became entitled to the proceeds of the said policy of insurance upon the maturity thereof, for and on behalf of the minors William E. Gardner III, and James R. Gardner.

IX.

That on the 6th day of October, 1950, an order was issued by the Honorable Jay L. Henry, Judge of the Superior Court of the State of California, in and for the County of Sacramento, detaining the decedent, William R. Gardner, Jr., for supervision, treatment, care, or restraint; that said order also recited that the decedent was mentally ill; that on the 10th day of October, 1950, the decedent was adjudged to be mentally ill and was sent to the Veterans Hospital in Palo Alto, California.

X.

That plaintiffs are informed and believe, and therefore allege on information and belief, that the judgment of mental incapacity was never repealed, changed, modified or expunged from the records in any way; that no certificate showing that decedent was formally discharged as recovered, or that he was rated as competent, was ever filed by the Vet-

erans Administration or a chief officer thereof with the County Clerk of the County of Sacramento in accordance with the provisions of Section 1664 of the Probate Code of the State of California, as amended.

XI.

That on or about September 14, 1950, when plaintiffs George R. Gardner and Helen May Gardner Glaser were designated beneficiaries of the said policy of insurance, the decedent, William E. Gardner, Jr., was of sound mind; that subsequent to that date, he suffered physical and emotional deterioration and increasingly severe mental aberrations.

XII.

That on or about the 30th day of April, 1951, on which date the said decedent purported to change his beneficiaries, and as a direct and proximate result of the aforesaid mental and physical incapacities, decedent lacked the mental ability and capacity to enter into, modify, or change a contract.

Second Cause of Action

And for a second, separate and distinct cause of action, plaintiffs allege as follows:

I.

Incorporate by reference hereinto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of Plaintiffs' First Cause of Action, with like force and effect as if the same and each of them were herein set forth.

II.

That on or about September 14, 1950, when plaintiffs George R. Gardner and Helen May Gardner Glaser were designated beneficiaries under the said policy of insurance, the decedent, William E. Gardner, Jr., was of sound mind; that subsequent to that date, he suffered physical and emotional deterioration and increasingly severe mental aberrations; that on or about the 30th day of April, 1951, on which date the said decedent purported to change his beneficiaries, and as a direct and proximate result of his physical, mental and emotional ill-health, he lacked testamentary capacity.

Third Cause of Action

And for a third, separate and distinct cause of action plaintiffs allege as follows:

I.

Incorporate by reference hereinto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of Plaintiffs' First Cause of Action, with like force and effect as if the same and each of them were herein set forth.

II.

That between the 14th day of September, 1950 and the 30th day of April, 1951, upon which latter date the said decedent purported to change his beneficiaries, decedent was subject to undue influence and coercion exerted by the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, to which undue influence and coercion his

physical, mental and emotional illness made him particularly susceptible.

III.

That as a direct and proximate result of the aforesaid coercion and undue influence exerted upon decedent by the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, he was induced to preclude the natural objects of his bounty, viz., his children, from receiving any benefits from or under the said contract of insurance, substituting in their stead the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and one Willane Hester Haynes.

IV.

That plaintiffs are informed and believe, and therefore allege on information and belief, that the said Willane Hester Haynes also exerted undue influence and coercion upon the decedent; that the said Willane Hester Haynes is the daughter of the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and was not a natural object of decedent's bounty.

Wherefore, Plaintiffs pray as follows:

1. That the beneficiaries designated on September 14th, 1950, be recognized as the sole and true beneficiaries of decedent, subject, however, to the terms and provisions of the letter of the same date set forth in haec verba hereinabove.

2. That the purported change of beneficiaries of

April 30, 1951, be declared null and void and of no force or validity.

3. That the proceeds due under the said policy of insurance be paid to the plaintiffs George R. Gardner and Helen May Gardner Glaser, as trustees for the minors William E. Gardner, III and James R. Gardner.

4. That the defendants Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes take nothing under the said policy of insurance.

5. That the Administrator of Veterans Affairs, Harvey V. Higley, or his successors in such office, be ordered forthwith to turn over the proceeds of said policy of insurance to the beneficiaries George R. Gardner and Helen May Gardner Glaser, as trustees for the minors William E. Gardner, III and James R. Gardner.

6. For such attorneys' fees as are allowed by law.

7. For costs of suit incurred herein.

8. For such other and further relief as to the Court may seem just.

Demand for trial by jury is hereby made.

/s/ GEORGE R. GARDNER.

/s/ HELEN MAY GARDNER GLASER.

Duly Verified.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes, two of the defendants, answer plaintiffs' complaint:

As to the First Cause of Action

I.

Expressly admit the allegations contained in paragraphs I, II, III, IV and V.

II.

Answering the allegations contained in paragraphs VI, VII, IX and X, these answering defendants have no information or belief upon the subject of any allegations thereof sufficient to enable them to answer said paragraphs and, basing their denial upon such ground, deny each and every allegation thereof.

III.

Answering the allegations of paragraph VIII, these defendants deny each and every allegation thereof.

IV.

Answering the allegations of Paragraph XI, these defendants deny each and every allegation thereof.

V.

Answering the allegations of paragraph XII, these defendants deny each and every allegation thereof.

As to the Second Cause of Action

I.

Answering paragraph I of the alleged second cause of action, these defendants refer to and incorporate by reference, as if fully set forth herein, all of their allegations, denials and admissions contained in their answer to the alleged first cause of action.

II.

Answering the allegations of paragraph II, these defendants deny each and every allegation thereof.

As to the Third Cause of Action

I.

Answering paragraph I of the alleged third cause of action, these defendants refer to and incorporate by reference, as if fully set forth herein, all of their allegations, denials and admissions contained in their answer to the alleged first cause of action.

II.

Answering the allegations of paragraph II, these defendants deny each and every allegation thereof.

III.

Answering the allegations of paragraph III, these defendants deny each and every allegation thereof.

IV.

Answering the allegations contained in paragraph IV, these defendants deny each and every allegation thereof, with the exception that Willane Hester

Haynes is the daughter of Frances Shenk Hester, also known as Frances Shenk Hester Gardner.

Further Answering Plaintiffs' Complaint, and each and every alleged cause of action contained therein, these answering defendants deny generally each and every allegation contained therein not hereinbefore expressly admitted or otherwise denied.

Wherefore, these answering defendants pray:

1. That plaintiffs take nothing by way of their complaint.

2. That the proceeds due under the policy of insurance referred to in plaintiffs' complaint be paid to these answering defendants as the persons who are legally entitled to such proceeds.

3. That the Administrator of Veterans Affairs, Harvey V. Higley, or his successors in office, be ordered forthwith to turn over the proceeds of such policy of insurance to these answering defendants who are the beneficiaries thereof.

4. For their costs of suit herein.

5. For such other relief as may be proper.

APPEL, LIEBERMANN &
LEONARD,
/s/ CYRIL APPEL,
EVANS, THWING, JAQUA &
O'REILLY,

Attorneys for Defendants, Frances Shenk Hester,

aka Frances Shenk Hester Gardner, and Willane Hester Haynes.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 29, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS
UNDER RULE 36

Plaintiffs, Helen May Gardner Glaser and George R. Gardner, individuals, request defendants Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes, individuals, within 10 days after service of this Request, to make the following admissions for the purpose of this action only, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this Request, is genuine.

A. Report of Physical Examination, Mather Field, California, dated May 25, 1942.

B. Proceedings of Army Retiring Board, convened under the provisions of AR 605-250 in the case of 1st Lieutenant William E. Gardner, Jr., O-1639062, Signal Corps, held on the 2nd day of February, 1945.

C. Report of Physical Examination at De Witt General Hospital, dated February 1st, 1945.

D. Application for Hospital Treatment or Domi-

ciliary Care, dated 25 November, 1946, signed by William E. Gardner, Jr., and supporting documents.

E. Application for Hospital Treatment or Domiciliary Care, dated 13th of January, 1948, signed by William E. Gardner, Jr., and supporting documents.

F. Final Summary, Birmingham Veterans Administration Hospital, Van Nuys, California, dated December 4, 1948, and cover letter.

G. Psychiatric Report on William E. Gardner, Jr., dated July 29, 1949, signed by B. Brownfield, M.D., Psychiatrist, Outpatient Service, Veterans Administration Hospital, Palo Alto, California.

H. Hospital Record, Veterans Administration Hospital, San Francisco, California, signed by S. W. Bergreen, M.D., for the period October 6, 1949, to November 8th, 1949.

I. Letter from Henry Mayer, M.D., to Veterans Administration District Office, Disability Insurance Claims Division, 1509 Clay Street, Oakland 12, California, dated October 19, 1949.

J. Hospital Records — Letterman General Hospital, San Francisco, California, for period November 11, 1949 to November 18, 1949.

K. Veterans Administration, Report of Physical Examination, Veterans Administration Regional Office, dated March 15, 1950.

L. Medical Report — Veterans Administration

Hospital, Palo Alto, California, for period October 11, 1950, to December 22, 1950.

M. Abstract of Claims File—Veterans Administration Regional Office, San Francisco, California, dated October 31, 1950.

N. Report of Hospitalization for Insurance Purposes — Veterans Administration Hospital, Palo Alto, California, dated December 28, 1950.

O. Certificate of Death — William Ellsworth Gardner, Jr., showing date of death as March 16, 1952.

P. Letter from Veterans Administration to Jesse E. Fluharty, Attorney at Law, dated September 29, 1952.

2. That each of the above listed documents is admissible into evidence under the provisions of Sections 1732 and 1733 of Title 28 of the United States Code.

Dated: This 21st day of February, 1957.

/s/ JESSE E. FLUHARTY,
Attorney for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 28, 1957.

[Title of District Court and Cause.]

STIPULATION IN RE GENUINENESS
OF DOCUMENTS

A request for the admission of the genuineness of that certain set of documents marked A through P having been made on behalf of plaintiffs and served on defendants, on February 21, 1957, it is hereby stipulated by and between the parties hereto that said documents and each and every one of them is genuine. It is further stipulated by and between the parties hereto that defendants reserve all objections as to the competency, materiality or relevancy of each and every one of said documents, and each and every part thereof, and this admission of the genuineness of such documents is not an admission of the competency, materiality or relevancy of any of such documents or of any part thereof.

Dated March 29, 1957.

/s/ JESSE E. FLUHARTY,
Attorney for Plaintiffs.

APPEL, LIEBERMANN &
LEONARD,

/s/ By ALEXIS J. PERILLAT,
Attorneys for Frances Shenk Hester, aka Frances
Shenk Hester Gardner & Willane Hester
Haynes.

[Endorsed]: Filed April 1, 1957.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 20th day of June, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: The Honorable J. Frank McLaughlin, District Judge.

[Title of Cause.]

This case came on regularly this day for trial before the Court sitting with a jury. Jesse E. Fluharty, Esq., was present for and on behalf of the plaintiffs. James S. Eddy, Esq., Assistant U. S. Attorney, was present for and on behalf of the U. S. Alexis J. Perillat, Esq., was present for and on behalf of the defendants Frances Shenk Hester Gardner and Willane Hester Haynes. James S. Eddy was excused as the United States was not participating in the trial of the case.

The Court impanelled a jury as follows: Miss Helen F. Hansen, Thomas H. Plummer, Thomas M. Ford, Mrs. Josepha A. McVay, Joe McCullough, Earl L. Young, Mrs. Willa M. Spencer, Mrs. Eme-line G. Sprague, Mrs. Viola P. Volkers, Ferdinand D. Simoni, Mrs. Eleanor S. Simonsen, William R. Yeager.

The foregoing persons were sworn as jurors to try the issues joined in this case.

After opening statements by respective counsel,

plaintiff marked for identification Plaintiff's Exhibits A to P, incl., O-1, Q to Z, incl., AA to AI, incl. Plaintiff's Exhibits A, B, D to H, J, K, L, N, O-1, and S were admitted into evidence. George Robert Gardner, Mrs. Helen Glaser and Mrs. Leilia Gardner were sworn and testified for and on behalf of the plaintiffs, and the plaintiffs rested. Thereupon Mr. Perillat made a motion for a directed verdict in favor of the defendants. After hearing the attorneys in the absence of the jury, and due consideration having been had thereon, it is Ordered that the motion be and the same is hereby Granted. The Court thereupon instructed the jury to bring in a directed verdict for the defendants. Mrs. Willa M. Spencer, Juror No. 7, was appointed foreman of the jury by the Court, and signed the form of verdict presented to her by the Clerk. Thereupon the Court Ordered that judgment be entered in accordance with the verdict. The jury was then excused until further notice. Attorney's fees for Mr. Perillat set by the Court at the ten per cent statutory fee.

In The United States District Court, Northern
District of California, Northern Division

No. 7102

HELEN MAY GARDNER GLASER, et al.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

JUDGMENT ON DIRECTED VERDICT

This cause having come on regularly for trial on the 20th day of June, 1957, before the Court and a jury of twelve persons duly impaneled and sworn to try the issues joined herein; Jesse E. Fluharty, Esq., appearing as attorney for the plaintiff, and James Eddy, Assistant United States Attorney, and Alexis J. Perillat, Esq., appearing as attorneys for the defendants, and the trial having been proceeded with on the 20th day of June in said year, and oral and documentary evidence on behalf of the plaintiff having been introduced and closed, and the defendants' motion for a directed verdict and the arguments thereon, and the Court being fully advised in the premises, It Is Ordered that the motion for a directed verdict be and the same is hereby granted, and thereupon the jury were instructed to bring in a verdict for the defendants, which was ordered recorded on the minutes of the Court and which verdict is as follows:

“We, the Jury, find in favor of the Defendants

as we have been directed by the Court, Willa M. Spencer, Foreman."

It is therefore Ordered that judgment be entered herein in accordance with the verdict and with costs.

Dated: June 20th, 1957.

C. W. CALBREATH,

Clerk,

/s/ By EDWARD C. EVENSEN,
Deputy Clerk.

Entered In Civil Docket June 22, 1957.

[Endorsed]: Filed June 22, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice of Appeal is hereby given that Helen May Gardner Glaser and George R. Gardner, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of June 20, 1957, sustaining a motion for a directed verdict and from the final judgment entered in this action on June 22, 1957.

Dated: August 19, 1957.

JESSE E. FLUHARTY & LANDIS,
BRODY & MARTIN,

/s/ By ALVIN LANDIS,

Attorneys for Appellants, Helen May Gardner
Glaser and George R. Gardner.

[Endorsed]: Filed August 20, 1957.

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS

Appellants, plaintiffs in the above entitled action, intend to rely upon the appeal of the above entitled action upon the following points:

1. The District Court erred in deleting the word "suicide" from Plaintiffs' Exhibit "O-1" before admitting it in evidence.

2. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "T".

3. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "U".

4. The District Court erred in refusing to admit the testimony of Plaintiff Helen May Gardner Glaser pertaining to the conversation with William E. Gardner, Jr.

5. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "A-1".

6. The District Court erred in refusing to admit the testimony of the witness Leila G. Gardner.

7. The District Court erred in granting the motion for direct verdict for the defendants.

8. The District Court erred in entering judgment for defendants.

Dated: November 14, 1957.

JESSE E. FLUHARTY and

LANDIS, BRODY & MARTIN,

/s/ By ALVIN LANDIS,

Attorneys for Appellants, Helen May Gardner
Glaser and George R. Gardner.

[Endorsed]: Filed November 14, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case, and that they constitute the record on appeal herein as designated by the plaintiffs.

Complaint.

Answer.

Motion to join third parties as plaintiffs.

Order of joinder.

Request for admissions.

Stipulation in re genuineness of documents.

Plaintiffs' memorandum prior to trial.

Defendants' trial memorandum.

Disclaimer of Bonnie Lucille Gardner Swanson.

Plaintiffs' proposed instructions.

Defendants' proposed instructions.

Minute order of June 20th, 1957.

Verdict of the jury.

Judgment on directed verdict.

Notice of appeal.

Cost bond on appeal.

Order extending time to docket appeal.

Order extending time to docket appeal.

Appellants' statement of points.

Designation of the record on appeal.

Deposition of Ernest Frederick Russell, M.D.

Deposition of Richard G. Boyce.

One (1) volume Reporter's Transcript.

Plaintiffs' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, O-1, P, Q, R, S, T, U, V, W, X, Y, Z, AB, AC, AD, AE, AF, AG, AH and AI.

Copy of Docket Entries.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 15th day of November, 1957.

[Seal] C. W. CALBREATH,
 Clerk,
/s/ By C. C. EVENSEN,
 Deputy Clerk.

In The District Court of the United States
Northern District of California,
Northern Division

No. 7102

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, individuals,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, HARVEY V.
HIGLEY, as Administrator of Veterans Af-
fairs and his successors in such office as such,
FRANCES SHENK HESTER, also known as
FRANCES SHENK HESTER GARDNER,
and WILLANE HESTER HAYNES,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Reporter's Transcript of Proceedings Had On
Trial On June 20, 1957.

Appearances: For the Plaintiff: Jesse E. Fluharty, Esq., 926 J Street Building, Sacramento, California. For Defendant United States of America: James S. Eddy, Esq., P. O. Building, Sacramento, California. For Defendants Hester and Haynes: Alexis J. Perillat, Esq., San Francisco, California. [1*]

* * * * *

Mr. Fluharty: The first document, and counsel has a copy of it, I would like to offer, is Document No. A, which is a report of physical examination by the Mather Field Facility of the United States Army which is signed by Cleveland R. Steward, Lt. Col., Medical Corps, Joseph F. McDonough, Major, Medical Corps, and Donald K. Barstow, First Lieutenant, Medical Corps.

Mr. Perillat: If the Court please, we object on the basis of incompetency, irrelevancy and immateriality. These documents are not one set of documents received in the regular [87] course and scope of business in accordance with Title 18, Section 32.

Mr. Fluharty: If the Court please, of course, we have argued this one matter at length yesterday, and I merely will reiterate the argument we made yesterday. These documents have been admitted to as genuine under a request for admissions, and their materiality and competency would be with respect to whether or not a medical record of the United States Army would be admissible.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

The Court: I can't read this photostat. Is this a hospital record?

Mr. Fluharty: It's from Mather Field and three doctors have signed it, your Honor. "Report of Physical Examination" at the Mather Field Facility, United States Army. Of course, it's our contention, too, these documents will not only come in as Hospital Records, but also official records of the United States Government.

The Court: This admission as to genuineness takes the place as to certification?

Mr. Fluharty: Yes, your Honor. It is our contention it would come in under Section 1733 of Title 28, sub-section A, which is, "The books or records of accounts or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, or transaction or occurrence as a memorandum of which the same were made or kept." [88]

If the Court please, the request for admissions is based on the language of the rules which is the genuineness. The word "Genuine" being a generic term, would also include being kept in the regular course of business. Now, the relevancy and the materiality I will admit is open to question, whether it's relevant to show when the increasing attacks of grand mals and petit mals began, I believe is a perfectly valid objection, and I think we have a starting point somewhere in our evidence, and this would be the starting point in 1952 that he was competent.

And then we intend to show through records of

the Government and the hospitals these increasing attacks.

The Court: The objection is overruled.

Mr. Fluharty: Thank you, your Honor.

Mr. Perillat: Will the Court allow us to be heard with authority?

The Court: No.

The Clerk: Plaintiffs' Exhibit A admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiffs' Exhibit A admitted into evidence.

(Report of physical examination referred to was marked Plaintiffs' Exhibit A and received in evidence.)

The Court: Admitted on the basis of the admission of genuineness, which is Section 3133, Title 28.

Mr. Fluharty: Now, ladies and gentlemen of the Jury, these [89] reports are rather long and involved; and, if we were to read the entire mass of them to you, it would take a considerable length of time, much longer than I believe any one of us would want to be here, so I'm going to take the privilege of reading what I feel to be important sections.

Now, opposing counsel will also have that privilege, if he so desires, to read the entire record into the evidence, or to read portions thereof.

Now, in addition to that, since it has been admitted into evidence, I'm sure the Court will inform you you may have the right to examine these docu-

ments yourselves in your deliberations. So, at this time, this is "The Report of Physical Examination." It says: "(See AR 40-100 and 40-105)," and I believe "AR" stands for "Army Regulations." It's signed by Cleveland R. Steward, Lt. Col. Medical Corps, Joseph F. McDonough, Major, Medical Corps, and Donald K. Barstow, First Lieutenant, Medical Corps. And it's with respect to William E. Gardner, Jr., a civilian, and down in the lower, right hand column, across the bottom it has the notation "Physically qualified," with initials, "S.J.S." And on the back it says, "Remarks on defects not sufficiently described," and it says "None." In "Corrective measures, or other action recommended, None." And it shows Mather Field, California, May 25, 1942.

Now, the next bit of evidence that I have to offer, your Honor, is the proceedings of the Army Retiring Board convened [90] under the provisions of Article of War (sic) 605-250 in the case of First Lieutenant William E. Gardner, Jr., O-1629062, Signal Corps, with its supporting Exhibits A through F, and at this time I offer this into evidence on the same terms and conditions as the previous.

The Court: Now marked "B" for identification.

The Clerk: Plaintiffs' Exhibit B has been marked for identification.

Mr. Perillat: Does the Court wish me to continue to renew my objections?

The Court: Yes.

Mr. Perillat: I offer the same objections.

The Court: This is a Government document; same ruling. It may be received in evidence.

The Clerk: Plaintiffs' Exhibit B admitted into evidence.

(Proceedings of Army Retiring Board were marked Plaintiffs' Exhibit B and received in evidence.)

Mr. Fluharty: At the heading of this document it says "Proceedings of the Army Retiring Board convened at the DeWitt General Hospital on the 2nd day of February, 1945, of the following orders": And then it lists a number of orders out of the official Army Hospitals, which I will not present to you. At the beginning of it, the Board convened at 10:00 o'clock and present were Lt. Col. Charles E. Gibson, Quartermaster Corps; Major Robert R. Keeler, Infantry; Major Donald C. Malcolm, [91] Medical Corps; Major Victor E. Hermansen, Field Artillery; Major Clarence E. Snow, Medical Corps. Absent were Lt. Col. Richard R. Brady, Medical Corps; Major Norman W. McMullen, F.D.; Major Arthur A. Koepsel, Medical Corps; Major Arthur C. Kinsley, C.E.

The introductory paragraph says: "William E. Gardner, Jr., First Lieutenant, O-1039062, Signal Corps, appeared before the Board pursuant to paragraph 14, Special Orders 27, DeWitt General Hospital, Auburn, California, dated 31 January, 1945, which is hereto attached, marked Exhibit C, and stated that he did not desire Counsel.

"The order convening the Board was then read, and Lieutenant Gardner was asked if he had any

objection to offer to any member present, to which he replied in the negative.

“The members of the Board, the Recorder, and the Reporter were then duly sworn. The officer before the Board was then duly sworn and made the following statement:”

Now, the part I feel to be pertinent on this page is:

“Maj. Miller: Lieutenant Gardner, will you please state briefly the cause and nature of any disability that you might have?”

“A.: I understand it started the middle of December, 1942. I understand I have idiopathic epilepsy, cause unknown. I have never had anything like it before in my life. I had a slight head injury at Fort Monmouth while on a field problem.

“Maj. Miller: What date? [92]”

“A.: The middle of December, 1942. I was on the double run and hit my head on the bough of a tree and was knocked to my knees. I had nothing prior to this time. I talk with my family about it and they had no knowledge of epilepsy being in our family.”

Skip a few pages to page 4. In the middle of the page, Major Malcolm says:

“Approximately how many attacks has he had each year since then?”

“A.: The attacks which began in December, 1942, have increased in severity to the extent that this officer has had three to four attacks per week, sometimes more and sometimes less.”

And then we will go to page 6 of this document. The last four lines, in which it recites:

"The President of the Board asked the officer before the Board if he wished to make an oral or written statement, to which he replied that all statements made were correct."

"The Board was then closed for deliberation and having maturely considered the case finds:

"That First Lieutenant William E. Gardner, Jr., O-1039062, Signal Corps, is incapacitated for active service. That said incapacity is the result of an incident of service. That the cause of said incapacity is epilepsy, mixed type, grand mal and petit mal. That the cause of said incapacity is an incident [93] of service. That said incapacity originated on or about 28 December, 1942. That said incapacity is permanent.

"The Board reopened and the President of the Board announced the findings to Lieutenant Gardner, and advised Lieutenant Gardner in writing of his right to file application for pension.

"The Board adjourned at 10:36."

Signed "Charles E. Gibson, Lt. Col., Q.M., President. R. W. Miller, Major, M.A.C., Recorder,"—which I believe is "Medical Administration Corps."

And then attached to this in the back is a brief clinical abstract. And the pertinent portions of it—

Mr. Perillat: Excuse me, counsel, I don't believe I have these in the same order you have, so, if I may interrupt you—

Mr. Fluharty: "This patient was admitted to the

8th General Hospital on 7 November, 1944, complaining of fleeting and transitory memory lapses, which began on 28 December, 1942, while teaching class at Fort Monmouth, New Jersey. A grand mal seizure and many petit mal seizures were observed overseas. He was evacuated and admitted to this hospital. Here petit mal and grand mal seizures were observed by medical officers.”

And then, counsel, the next page, next two pages later——

Mr. Perillat: I don't have that which was just read.

Mr. Fluharty: Would you like to look at this then?

Mr. Perillat: I don't have some of these things that counsel was reading from. [94]

The Court: Just a minute.

Mr. Fluharty: He was served with a copy of the entire thing.

The Court: Something happened to the copies?

Mr. Perillat: It's still in its original form as I received it, your Honor.

The Court: You should have them if you are charged with admitting they are genuine.

Mr. Perillat: That, again, goes to my objection because this is not one composite record, as he stated yesterday, from one institution. This has been a collection of papers from all over.

Mr. Fluharty: This is a report of physical examination from the hospital; and, if he hasn't received a copy of it, although I mailed them to him and I have an affidavit of service of mail from

my girl, I would be happy not to read this one because it is a repetition of previous material, your Honor.

The Court: The important thing, anyway, is the man was discharged with physical disability. There are two problems: One is your legal objection, the other is whether or not there has been any variation between the copies you were given to react to as genuine or whether they were different.

Do you have this clinical material attached to your copy of Exhibit B at all? [95]

Mr. Fluharty: Yes.

The Court: No, I'm asking Mr. Perillat. What's the last page you have?

Mr. Perillat: I have quite a volume of pages, but I have been having trouble trying to follow counsel.

The Court: Do you find it now?

Mr. Perillat: "Disposition of Board proceedings." Is that what you are reading?

Mr. Fluharty: May I show you?

Mr. Perillat: Surely.

The Court: Find it now? Is it complete?

Mr. Perillat: Yes, sir.

Mr. Fluharty: Do you have the medical abstract?

Then we have a medical abstract which is rather short.

The Court: Is it an exhibit for identification?

Mr. Fluharty: No, it's the same exhibit.

The Court: "B" in evidence?

Mr. Fluharty: Yes, which a portion of it reads as follows:

“A grand mal seizure and many petit mal seizures were observed overseas. He was evacuated and admitted to this hospital. Here petit mal and grand mal seizures were observed by medical officers.”

And that's the end of the reading from this document, your Honor. [96]

The Court: Couldn't we shorten this procedure up? I understand from the opening statement there is no dispute but what the man had epilepsy.

Mr. Fluharty: Well, your Honor, what I intend to show, as we go through these documents, the epilepsy became increasingly severe and he went into psychosis. This is merely preliminary. This is the end of the preliminary matter.

The Court: Well, all right, but don't be going over too much detail.

Mr. Perillat: If the Court please, may I make an objection on the basis of the offer of this evidence that, unless he ties up this epilepsy with any kind of organic disease, I am going to object to all of this evidence which he is going to offer on that subject unless he is going to tie it up with expert testimony.

The Court: That is right.

Mr. Perillat: I may give your Honor the case which holds directly a man may have an epileptic seizure an hour before he executes his will, so that is no evidence of incapacity and the basis for my objection. Unless counsel is prepared to tie up

medically these two different distinct types of illnesses, why, then I think the objection should be sustained or at least subject to a motion to strike if he hasn't done that.

Mr. Fluharty: I think we have. On the other hand, your Honor, these medical reports will show that many of the reports, [97] as I have stated in my opening statement, do indicate that this man was mentally incapacitated and had increasing severity of attacks, plus the general breakdown, which resulted in the commitment. Of course, since the man is not here, the only way we can do it is through these medical records, and I'm reading very small portions of the record, I can assure you, your Honor, just one or two paragraphs.

The Court: I will overrule the motion to strike at the moment. You may continue. You may renew your point subsequently after I get a better grasp of what's going on.

Mr. Perillat: Thank you, your Honor.

Mr. Fluharty: Exhibit C for identification I will not read from.

The Clerk: Plaintiffs' Exhibit C marked for identification.

Mr. Fluharty: I am not offering that.

The Court: Just remained marked for identification.

The Clerk: Yes, your Honor.

The Court: Incidentally, ladies and gentlemen of the jury, things marked for identification are not in evidence. They are simply tags put on things so we can know what we are talking about.

Juror No. 1: It's sometimes difficult to hear the attorneys.

The Court: All right. I will ask them to speak louder. [98] Thank you for speaking. Of course, sometimes when they are talking to me, it isn't important for you to hear, but I will ask them to speak louder.

While I think of it, throughout this case, as in every case, the attorneys are not on trial.

Mr. Fluharty: The next I offer into evidence, your Honor, is Plaintiffs' Exhibit D for identification.

The Court: What is it?

Mr. Fluharty: Exhibit D——

The Court: Yes.

Mr. Fluharty: —— is an Application for Hospital Treatment, or Domiciliary care with The Veterans Administration, and I offer it as a document of the United States Government.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit D admitted into evidence.

(The Application for Hospital Treatment and Domiciliary Care was marked Plaintiffs' Exhibit D in evidence.)

The Court: Proceed.

Mr. Fluharty: This Plaintiffs' Exhibit D, attached to the top of it, is a certificate of Hospital Treatment or Domiciliary Care, Certificate of Eligibility, and approval, and shows that William Gardner, Jr., it states on here, is eligible for hospital treatment. And then it refers to "See attached

correspondence," and it's signed by J. L. Reigt, Medical Doctor. The certificate itself is an application for [99] hospital treatment or domiciliary care and signed at the bottom thereof by William E. Gardner, Jr. On the second page it says, "Brief history: Nervous condition. See attached sheet." And it's signed by C. Dwight Yates, Examining Physician of the V.A.

On the attached sheet is a history in which the second paragraph—I'm sorry. We will go on to the third paragraph.

"Last Saturday, two days ago, while at home, patient suddenly became very weak, and felt as though he were going to lose consciousness. This was accompanied by a severe constricting type headache."

And down at the bottom under the physical examination section it says, "Refer to Neurologist, possible recent cerebral organic change."

And I offer that into evidence.

The Court: It has been received.

Mr. Fluharty: The next that I offer is Plaintiffs' Exhibit E.

The Court: "E" for identification?

Mr. Fluharty: Yes, your Honor. "Application for Hospital Treatment or Domiciliary Care, Veterans Administration." And I offer that on the same terms as before.

The Court: That's a different application than the other one?

Mr. Fluharty: Yes, your Honor. [100]

The Court: Then it may be in evidence.

The Clerk: Plaintiffs' Exhibit E admitted into evidence.

(Application for Hospital Treatment or Domiciliary Care was marked Plaintiffs' Exhibit E in evidence.)

Mr. Fluharty: This one is an application for hospital treatment or domiciliary care of William E. Gardner, Jr., and the pertinent provision of this is on the second page thereof in which there is a brief history of petit mals with occasional grand mals and convulsive type seizures since 1942. He's taking dilantin, 1/10 gram tid & Mebarol, from 4 to 12 grains, a day. "Despite this, he is having daily petit mal attacks, one to two times, with occasional incontinence of urine and feces. Symptoms: Irritability, confusion, mild blackouts without falling but occasional sphincter incontinence." And diagnosis once again is "Epilepsy, grand mal and petit mal. He has not been hospitalized for about four years and treatment in a hospital is advised. Recommended: Hospitalization at Sawbello." Signed: "Kenneth G. Rew, Medical Doctor, January the 15th, 1948."

The Court: Excuse me. We will take our 11:00 o'clock recess.

Ladies and gentlemen of the jury, I am going to tell you now and refer to it later without repetition, that while you are jurors, you are part of the Court and, hence, there are certain ground rules you have to observe. First of all, you cannot [101] talk about this case with anyone, including fellow jurors, nor let anyone talk about it in your pres-

ence. Do refrain from making up your minds until you hear the entire case. Also, do not loiter in the hallways or fraternize with any of the parties or the parties' attorneys or witnesses. Remain aloof and uncontaminated. Remain qualified jurors.

(Whereupon a recess was taken.)

The Court: Note the presence of the jury. You may continue.

Mr. Fluharty. Thank you, your Honor.

The next exhibit that I offer into evidence, if the Court please, is Plaintiffs' Exhibit F for identification which is from the Birmingham General Hospital. The final summary from the case in the Birmingham General Hospital, Van Nuys, dated December 4, 1948.

The Court: Is this a Federal Hospital?

Mr. Fluharty: Yes.

The Court: All right. It may be received.

The Clerk: Plaintiffs' Exhibit F admitted into evidence.

(Summary report on case from Birmingham General Hospital, marked Plaintiffs' Exhibit F in evidence.)

The Court: Please move along a little more rapidly.

Mr. Fluharty: Yes, your Honor. I'm referring now to the letter of transmittal that was sent to the Veterans Administration Hospital in Palo Alto under the signature "A. P. Willis, Registrar, from the Birmingham General Veterans Administration [102] Hospital in Van Nuys, California, and it's

a medical abstract; and, on the second page, the last sentence of paragraph 1, the statement is that: "The patient was discharged from DeWitt General Hospital on 3/19/45 with a diagnosis of grand mal and associated petit mal epilepsy, and was placed on Dilantin, grain 4½ daily. However——"

Then going into the second paragraph:

"However within recent months the patient has experienced several financial set-backs and marital difficulties. These factors have been aggravated by increasing frequency and severity of seizures. He entered Birmingham Veterans Administration Hospital for a complete examination."

"Initial impression was: Epilepsy, grand mal and petit mal."

Now, on page 2, the last two paragraphs:

"While hospitalized the patient had been placed on various combinations of anti-convulsants consisting of Tridione, Dilantin, Phenobarbital. At present the patient is taking Tridione, Gr. 9, Dilantin, Gr. 7½, Phenobarbital, Gr. 1½ daily with good results. On 29 March the patient became markedly disturbed and violent and somewhat confused. This happened to follow a petit mal seizure. He was transferred to a locked ward overnight and appeared to recover adequately during that time. He was subsequently placed in an open ward and no further abnormalities of behavior were noted."

The diagnosis once again was, "Epilepsy, grand mal and petit mal, idiopathic type."

Signed "D. H. Mansel, M.D., Ward Physician."

The Court: Next?

Mr. Fluharty: Now the next we have, your Honor, is Exhibit G, which we offer, which is an Out-patient Service of the Veterans Administration Hospital, Palo Alto, of B. Brownfield, Medical Doctor, Psychiatrist, and it's an out-patient report. It has attached to it the clinical data which is approved by Robert E. Kantor, Chief Clinical Psychiatrist. And we offer this in evidence as Plaintiffs' Exhibit G.

The Court: Is that a Federal Hospital?

Mr. Fluharty: Yes, your Honor.

Mr. Perillat: May I ask the date of the report be given for the benefit of the jury?

Mr. Fluharty: July 29, 1949.

We have now went through seven years of reports, your Honor.

The Court: They may be received in evidence.

The Clerk: Plaintiffs' Exhibit G admitted into evidence.

(Out-patient report of Palo Alto Veterans Hospital marked Plaintiffs' Exhibit G in evidence.)

Mr. Fluharty: The first page, Psychiatric Report on William E. Gardner, Jr. July 29, 1949.

"Patient was seen once on December 8, 1948, but felt that [104] he needed no psychiatric help then. On June 3, 1949, he returned on the advice of Dr. Roberts, V.A., Oakland, asking for psychiatric help, and has been seen on June 6, July 7, 11, 13, 15, 19, 27 and 29, 1949.

"The patient has spent much of the time discussing the treatments he has received elsewhere and

asking for reassurance that his seizures would be helped by psychiatric care. In his visits, he has shown much verbal egression, which is barely disguised, against the Creator, who seems to be representative to him of all authority figures, and of his father, who deserted his mother when the patient was seven years old. All this hostility and a dependency upon others for reassurance and support is thinly veiled. Some paranoid trends are evident but thus far no psychotic evidence is present.

“Prognosis for psychiatric treatment seems fair for the development of mere insight. This could improve his seizure condition.

“Signed B. Brownfield, M.D., Psychiatrist, Out-patient service, VAH PA.”

The second page at the top, and this is dated July 8, 1949, which they say “Tests administered: Rorschach, Bender-Gestalt. Psychological examination was requested for diagnostic information. The patient is subject to frequent epileptic attacks of grand mal and petit mal types, with onset in 1942. Evidence of psychological involvement is sought, as well as assessment of the adequacy [105] of his defense mechanisms. The Rorschach and Bender-Gestalt were administered to the patient, who needed much reassurance and showed great concern for the quality of his performance.

“Personality evaluation: Intellectually, the patient is of high average intelligence, but his productivity is severely restricted by the rigid intellectual control that he must use in dealing with his environment. His perception of reality is more de-

terminated by his inner needs than by objective factors which results in quite idiosyncratic perceptual processes."

Down at the bottom we have a "Diagnostically, the patient presents the picture of a paranoid personality with compulsive trends. He is not presently psychotic; however, the extensive projection, the difficulty in distinguishing reality, and the nature and strength of the defense mechanisms indicate that a psychotic break is possible if additional stress from the environment is met.

"Prognosis for psychotherapy is guarded since his motivation is to seek answers to the causal factors of his epilepsy rather than a genuine desire for help. His anxiety is minimal and is primarily related to 'why' and not to 'I am uncomfortable in my present condition.' A relationship with this patient is possible only if he is reassured (1) that his dependency upon a therapist is not dangerous, (2) that he will not be rejected, and if (3) the possibility of libidinal impulses toward the therapist is recognized. [106]

"Summary: This patient is basically a paranoid personality whose present picture is that of a compulsive neurotic. His defense of denial, rigid over-control, repression, projection, compulsion, and reaction formation are primarily directed against unacceptable hostile impulses, overwhelming dependency needs, and homosexuality.

"Suggested diagnosis: Paranoid personality type with compulsive trends, chronic, severe.

“Approved: Robert E. Kantor, Chief Clinical Psychologist.

“Presented by: J. Humphrey and A. Ossorio.”

Next we have, your Honor, is Plaintiffs' Exhibit H for identification which is a clinical record and final summary on the Veterans Administration Form 10-2614, from the Veterans Administration Hospital, San Francisco, California, date of admission, October 6, 1949, and we offer that into evidence as a Government Hospital record.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit H admitted into evidence.

(Clinical record of Veterans Admn. Hosp., San Francisco, marked Plaintiffs' Exhibit H in evidence.)

Mr. Fluharty: This showed he was admitted by the Veterans Administration at 10:40 A.M. on October 6, 1949. The last sentence of the first paragraph under “Brief history” shows that: “These attacks became gradually more severe and frequent until he experienced a major convulsive state with some [107] intercurrent attacks of petit mal. Just prior to his entry into the hospital the patient was having six to eight grand mal attacks per day which were not being controlled by medication.

“Status on admission: Patient was admitted for uncontrollable convulsive state which had become more severe about one week prior to admission. It was noted on admission that patient tended to be somewhat hyperactive with psychomotor accel-

eration and markedly extrovertive type of personality.

“Hospital course: Patient was started on Dilantin for control of seizures. The dosage was built up to grains $1\frac{1}{2}$ daily. This dosage was again increased to six such doses daily and again increased later during hospital course to 7/10 grams daily. Seizures decreased somewhat under medication. However, the patient’s adjustment in the hospital became markedly poor. It was noted on admission that he had tended to be somewhat over-talkative, over-responsive, and hyperactive. As seizures decreased, these changes became more pronounced, and about three weeks after his admission, patient became psychotic, he showed a rather marked thinking disturbance, a marked increase of psychomotor activity, insisted upon writing quite a bit of non-understandable material, would talk to practically anyone in the hall extensively and loudly, and became a problem on the open neurological ward, and was transferred to the closed psychiatric ward on 11/3/49. Open ward privileges could not be allowed [108] due to the condition of the patient at this time. Patient apparently became quite upset concerning his being transferred to a closed psychiatric ward, his seizures had been absent during the period of psychotic behavior until the time of his being signed out by his family on 11/8/49, when he once again began to have seizures. The family was notified that the patient was both physically and mentally ill and that there was a possibility of an expanding type of lesion of the brain as indi-

cated by his last EEG. Family was also notified that the patient at the present time was not considered mentally competent, and there was a possibility that the patient could develop a status epilepticus if removed from treatment. Family persisted in their demands and against medical advice signed the patient out.

"Diagnosis: (1) Convulsive state, grand mal (with psychosis at time of discharge), treated, unimproved.

"Prognosis: Probably poor.

"Status on discharge: (1) Epileptic status, improved over entry. (2) Mental status, poor.

"Status of service connected disability: Unimproved.

"Intent: Treatment and control of convulsive state with improvement of present symptoms.

"Operation: (1) Lumbar punctures, Dr. B. F. Hansen, 10/11/49.

"Disposition: AMA.

"Admitted: 10/6/49. Discharged: November 8, 1949. [109]

"Signed: S. W. Bergreen, M.D."

Plaintiffs' Exhibit No. I will be passed.

The Court: "I" for identification passed.

Mr. Fluharty: The next exhibit we offer into evidence is a record of the Letterman's General Hospital of San Francisco, San Francisco, California, dated December 6, 1949, addressed to the Veterans Administration Regional Office, 49 Fourth Street, San Francisco, California, and states, "Transmitted herewith final summary pertaining

William E. Gardner as per your request of 6 December, 1949." And attached to it are the records of the Letterman General Hospital.

Mr. Perillat: What was the date?

Mr. Fluharty: December 6, 1949.

Mr. Fluharty: We offer that as the official record of the United States, and Veterans Administration Hospital.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit J admitted into evidence.

(Letterman General Hosp. record Dec. 6, 1949, marked Plaintiffs' Exhibit J in evidence.)

Mr. Fluharty: Second page, this page is entitled "Final Summary," ladies and gentlemen, and at its beginning it says: "William E. Gardner, Registry No. 303-024. Date of admission, 11 November, '49, date of discharge 18 November, '49.

"This 30-year-old white married veteran was admitted to [109-A] the neurosurgical service of Letterman General Hospital 11 November, 1949, as a transfer from the Palo Alto Hospital. History obtained from outside sources indicates that since 1942 when he suffered a head injury he has been subject to uncontrolled grand mal convulsions. A month ago he entered the Palo Alto Hospital for further study of his convulsions. At that time he showed no gross abnormalities of his mental status. On 2 November he went on pass to take care of some personal business. He returned in what was called a manic excitement, and had to be confined in a locked ward. On 8 November he signed his

release from the hospital. On 10 November he was found in his room with first and second degree burns of his right ear, right wrist and shoulder. The cause of his injuries was not determined but it was thought he sustained them during a seizure. He was returned to the hospital and then transferred to LGH to be studied for possible neurosurgical complications of the injury. At LGH he was confused and in poor contact. He expressed numerous bizarre paranoid delusions and attempted to fight with the ward personnel. It was necessary to sedate him with IV amytal and to put him in restraints. On 17 November he was given neurosurgical clearance and was transferred to the closed ward. Mental status examination revealed a mental content of a paranoid schizophrenic. He was expansive and grandiose with bizarre delusions of miraculous powers, etc., auditory hallucinations, etc. [109-B] However, he was more easily managed than on the neurosurgical ward and on 18 November he was released to his mother's custody to be placed in a nursing home.

"Except for the burns described above, physical examination was essentially negative.

"Laboratory and X-ray studies were normal.

"Diagnosis: (1) Epilepsy grand mal with psychosis, severe, unimproved. (2) Burns, first and second degree, right ear, right wrist and shoulder, treated, improved.

"Signed: E. J. Koller, Capt., MC, Neuro-psychiatric Service.

"Information hereon transcribed from retained

medical records. Henry A. Hardt, Major, Assistant Registrar."

Mr. Perillat: If the Court please, for the record at this time I shall renew my objection as to the—not only the competency and materiality, but specifically to the relevancy of the documents that are now being gone into. The date we are dealing with is April 30, 1951, and counsel is reading from documents that date back more than two years.

The Court: That is true.

Mr. Fluharty: I might point out, your Honor, my offer of proof heretofore made. We were showing the increasing frequency of the attacks, a course of action, and, as we have already gone into, we have now gone over seven years of records, and we have done it in a remarkably short time, your Honor, and [110] we are now in the nub of the thing; so, within this very short period of time, the pertinent actions are before the Court.

The Court: The objection interpreted as a motion to strike is denied. Proceed.

Mr. Fluharty: The second page is an "Application for Hospital Treatment or Domiciliary Care," and it shows "Cardinal Hotel, Palo Alto." "Permanent address, unknown." "William Gardner," and the "Active military Naval History," so forth, it says "Unknown," and "Admitted as emergency, unable to give information."

Counsel, if we can go down to the clinical record, general physical examination, which is a few pages down.

Now, under "Clinical record, General Physical Examination," it says at the top:

"General appearance and mental status: Well developed and nourished 30-year-old white male, dazed and confused, but at present tries to be co-operative. Find it difficult to give history because of sleepiness and post-convulsive confusion."

Under "Eyes," we have, "Marked ecchymosis about left eye. Fundi: Normal. External ocular movements: Normal. Pupils react well to light.

"Ears and nose: Right external ear is markedly swollen. There is a serious drainage from the right ear. The right tympanic membrane is broken." [111]

And then the bottom of the next page, Counsel, under "Initial impression, (1) Epilepsy, grand mal, idiology undetermined. (2) Fracture, skull, face, right, sustained in epileptic seizure on November 19, 1949."

And then the last page is: "Established clinical diagnosis: Burns, first and second degree, right ear and face, right shoulder and forearm. Epilepsy, grand mal and petit mal, uncontrolled.

"(1) Epilepsy, grand mal, severe.

"(2) Psychotic reaction, paranoid, chronic, moderate, secondary to dg. 1, manifested by bizarre paranoid delusions, auditory hallucinations and aggressiveness.

"(3) Burns, neck, first and second degree, ear, wrist and shoulder, right, incurred November 11, 1949, San Francisco, California, circumstances unknown."

And that's the end of that report.

Now, the next report, your Honor, which we offer into evidence is a report of physical examination of the Veterans Administration, dated March 15, 1950, under the name of the Examiner, John L. Reiger, M.D., title Medical Examiner. And this is the Veterans Administration official form of the United States Government.

The Court: Very well. Received as——

The Clerk: Plaintiff's Exhibit K admitted into evidence.

(Report of Dr. John L. Reiger, March 15, 1950, marked Plaintiff's Exhibit K in evidence.) [112]

Mr. Fluharty: Now, the fourth page, counsel. Figure 19, under this physical examination, Veterans Administration, called "Nervous system," and has the question: "Are brain, spinal cord, peripheral nerves, and mentality normal?" They have on here: "See special report," and it goes on to say "Remarks: While this examiner was conducting the general physical examination the claimant had what might be characterized as a modified grand mal attack. He apparently lost consciousness for two or three minutes, his face became cyanotic, there were probably no two convulsive motions, there was no rectile or urinary incontinence. There was no biting of the tongue. Dr. Schatz and Dr. Bailey were called and saw the claimant in the terminal part of the seizure. Claimant rather quickly recovered and the rest of the examination was conducted."

“Residuals of gunshot wounds or other injuries:”
This is 27.

“Claimant was hospitalized at Letterman General Hospital from November 11, 1949, on transfer from V.A. hospital at Palo Alto because of burns of the head, shoulder, and forearm, according to their report in the case file. He was found in his room on November 11 with the burns. It was conjectured that the burns were sustained during a seizure. On examination today there is rather extensive scarring of the right external ear, pre-auricular area, and over the mastoid, there is [113] partial loss of the right external ear, scars are raised, red and disfiguring. There is mild burn scarring on the right shoulder and two small areas on the dorsum of the right wrist. There is one small area over the dorsum of the right thumb.”

And continued: “There is no limitation of motion of the joints from this skin scarring. In addition there is a surgical scar on the palmar aspect of the right wrist, I am unable to get any clear explanation for this, claimant denies having inflicted the laceration himself.

“Diagnosis: (1) Epilepsy, idiopathic type, grand mal and petit mal of nature, without psychosis. See N.P. Report.

“(2) Hypertension, essential, arterial, mild.

“(3) Scars, face and right upper extremity, residuals of recent burn.”

Mr. Perillat: May I ask you to read that again? I think there were a couple words you read wrong.

Mr. Fluharty: “(1) Epilepsey, idiopathic type, grand mal and petit mal——”

Mr. Perillat: It’s the next word.

Mr. Fluharty: I believe it’s “native.”

Mr. Perillat: It’s off of the paper. Read the whole thing through again, if we may, your Honor. When they photostated it, a part of the word was left off the page.

Mr. Fluharty: “Epilepsy, idiopathic type, grand mal and [114] petit mal——” and it looks like an “f” there—“Nature, without psychosis. See N.P. report.

“(2) Hypertension, essential, arterial, mild.

“(3) Scars, face and right upper extremity, residuals of recent burn.”

The next one we offer, your Honor, is the hospital records of the voluminous V.A. Hospital in Palo Alto, California.

Date of admission, October 11, 1950, and this is the official report of the United States Government, and of one of the Veterans Administration Hospitals of the United States Government.

The Court: It may be received as——

The Clerk: Plaintiffs’ Exhibit L admitted into evidence.

Mr. Fluharty: This is October 11 of 1950. V.A. Administration Hospital, Palo Alto. Admitted by V.A. direct. And it’s First Lieutenant Gardner, William E. Under “Established Clinical Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic,

mild, in remission, manifested by frequent epileptiform seizures, agitated combative impulsive behavior, irritability, paranoid trends and periods of mental confusion.

“(2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn.”

These are voluminous, and I am not going to go into too many of them. [115]

On the history of the patient up at the top, on the history, it says at the very top of the page:

“Patient committed by Sacramento County. Patient states: Quote, ‘I have epilepsy and happened to get off my medication and combined with drinking I had a period of confused behavior.’ Close quotes.”

And then in the middle of the history—the page, “He continued to take phenolbarbital as the only medication to control his seizures, having only occasional ‘flicker spells’ which again occurred only in the mornings. The patient went into business for himself as a building contractor in which he did very well, netting approximately \$30,000 in the first year. He continued with phenolbarbital as a medication sporadically until November, 1949, when he had a ‘grand mal seizure’ in a Palo Alto Hotel. During this seizure he fell against a steam radiator, burning the right side of his face, his right ear, and fracturing his skull. He was admitted to VA-PA for several hours, and then shipped to Letterman General Hospital for further diminutive treatment. Altogether he was hospitalized for ap-

proximately two months following this incident. When the patient had recovered from his injuries, he was placed on Dilantin, of 6 tablets per day, and his seizures remained under control until approximately two weeks ago when he gradually discontinued his medication to about two tablets daily. The present episode which brought him [116] to the hospital occurred October 5th when at his mother's apartment in Sacramento he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and thought that other people he knew were tying him in with a dope racket. He attempted to contact the police by telephone from a store near his home but was not satisfied. He set out to the police station and accepted a lift from a woman who was passing in an automobile; and, when she attempted to stop her automobile and run away, he began to fight with her and struck her several times. The police finally arrived and took him to jail, from where he was transferred to the Sacramento County Hospital and sent to VA-PA October 12, 1950."

Continuing on into clinical record, psychological data, counsel, quite a ways down. This is the clinical record, psychological data, dated October 21, 1950.

"Tests administered: Wechsler-Bellevue Intelligence Scale. Rohrschach. Bender-Gestalt.

"Reason for referral: The patient was referred for psychological testing to evaluate, (1) The extent of psychotic thinking, and (2) His capacities for impulsive, errative behavior.

“III. Psychological evaluation: The patient is above average in intelligence and does not show evidence of deterioration of his intellectual capacities, per se, due to brain damage. At present he feels he [117] is under scrutiny, and he is making an effort to appear normal and sensible. He is quite guarded and cautious in revealing himself. Although there is a surface appearance of normality, when he is put under emotional pressure, his control weakens and shows evidence of bizarre and unrealistic thinking of a psychotic nature.

“He is unsure of his own control over his strong impulses, and he inhibits his spontaneous reactions and feelings. He feels comfortable expressing strong feelings only when they are clearly justified. However, he reacts to minor frustrations with strong feelings, and as he tries to hold these back, the pressure builds up inside him.

“His brittle control may break, and he reacts in an impulsive, erratic manner, or else he may distort reality in a paranoid manner and find reasons to justify the expression of his hostilities. During these periods his behavior will be psychotic and unpredictable.

“He appears to feel quite threatened by the loss of control during his seizures, and this may be an important factor in his distrust of his own capacity to express his emotions without becoming overwhelmed by them. It is possible that if he could be helped to express his feelings in moderation, he might feel less threatened and have less need to distort reality to justify his emotions.

“Suggested diagnosis: Epilepsy, idiopathic, manifested by psychotic reaction, mild. [118]

“Presented by: B. C. Finney and B. Martin. Approved by: Richard C. Hamister, Ph.D. Supervisor Testing Section, Clinical Psychology Service.”

And then if we can go down a ways, September 22, closing statement. And now we have on December 22, 1950, the final progress note and it's entitled in this section, “Doctor's Progress Notes.” And then we go on down here to the mental status.

“Patent on leaving was free of psychotic thinking, showed continued evidence of belief and mild feelings that the police had mistreated him in Sacramento and that this was somewhat of a trumped-up charge in that he did not choke the woman, which was stated on the petition for commitment, but that he only beat her up. He revealed no evidence of epileptic confusion; is clearly oriented, alert, spontaneous and overtly friendly. He retains a basic, very infantile and narcissistic personality trait in which he is very hostile to any reverse of his decisions, complete inability to accept any authority, especially male authority, and a very demand, hostile type of verbal attacks when refused his wishes, and no evidences of violent physical attacks other than his striking Dr. Johnson when first admitted; at which time it was felt he was still suffering from his acute psychosis.”

And then to the next page which we have the diagnosis and the prognosis: [119]

“Diagnosis: Continued with psychosis mild in complete remission.”

And then the prognosis: "As expected prognosis regarding future psychotic break is highly guarded. Enough evidence for future difficulties is present in that the relationship with Mrs. Hester is a very tenuous one, based upon highly neurotic reasons. The attitude of the patient's mother is very much against any successful adjustment between Mrs. Hester and the patient. The patient's own narcissistic needs and his demanding hostile attitude may prevent fulfillment of his desires to complete photograph school and indeed interfere with his adjustment outside more and more, especially so in such environmental factors, such as his mother and Mrs. Hester may change their attitude toward him. As regards his epilepsy, he at the present time has no seizures, however it is felt this is due to his continuing passive living while in the hospital situation. It is noted by the patient that these seizures come and go directly related to his emotional tension, and it is felt these may recur as emotional tension becomes unbearable. It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a very poor circumstance and his leaving here was also the best of a very poor situation, but that it was hoped that his stay here and some partial insight which we were able to give him and his accepting the hospital routine in spite of his demands may have offered him some opportunity for further improvement outside the hospital. [120]

"Signed: R. S. Mowry, M.D."

The Court: It is twelve o'clock. We will stop

at this time. Observe our noon recess until 1:30.

Bear in mind the Court's instructions concerning your conduct as jurors. 1:30.

(Whereupon a recess was taken until 1:30 p.m. of the same day.) [121]

Afternoon Session, 1:30 P.M.

The Court: Note the presence of the jury, parties present. You may proceed.

Mr. Fluharty: Counsel, we can go a little bit further on to November 23, 1950, psychological data.

The Court: In Exhibit what?

Mr. Fluharty: It's the one we were——

The Court: L, the last one?

Mr. Fluharty: The last one, yes.

The Clerk: That was L.

Mr. Fluharty: We are continuing to read, ladies and gentlemen of the jury, the hospital records at the Palo Alto General Hospital for this period, October 11, 1950, to December 22, 1950, and we are not going backwards in time, but because the report has been set up in Sections, Social Data, Clinical Data, and so forth, I am now reading another report which is under the heading "Psychological Data." And it reads as follows:

"Tests administered: Thematic apperception test, Minnesota multiphasic personality inventory, House-Tree-Person test.

"Purpose: Personality evaluation prior to discharge.

"Evaluation: During psychological examination,

the patient cooperated at a superficial level. He was expansive and grandiose regarding his past achievements and future occupational plans, and his plans to take care of his future wife and two children (by a former marriage). His certainty of his ability to deal with his mother, who is possessive toward him and opposes his marital and occupational plans, also appeared unrealistic. His discussion of all these problem areas appeared naïve and narcissistic.

“The patient is actually very resistive to testing. He tends to interpret any approach to him as some sort of test, and he is trying very hard to ‘pass’, as his chief conscious goal is to leave the hospital. He has attempted to exploit people toward this end, trying to secure their aid by superficial over-compliance, assertions of his ability, and denial of hostility. He frequently tries to have third persons intercede for him, to manipulate one another towards his ends.

“His behavior exhibits the hostility which is denied verbally. His verbalizations reveal strong passive dependent tendencies and a high degree of suggestibility.

“The results of psychological examination indicate that he has just average intelligence, which is insufficient to achieve and maintain his grandiose goals. The actual level of his intelligence is a particular problem to him, as it conflicts not only with his self-concept but also with the judgment of others, who generally think him more intellectually competent than he is and may therefore expect too much of him.

"The psychological tests give a fairly liberal translation of the patient's inter-personal behavior and statements [123] about himself. Thus his behavioral defenses are seen to be quite rigid, making it difficult to infer the underlying dynamics directly from his tests.

"There is evidence of a large passive-dependent need, against which his over-determined need for money, power, and appearance of success apparently serves as a reaction formation. His epileptic seizures must threaten this reaction formation, which is felt to have existed in his personality prior to the first onset of seizures. He has probably reacted to the threat by more desperate but less effective use of a defense which might otherwise have worked well enough.

"The patient has considerable unconscious confusion about his relationships to both men and women. In men he apparently seeks a kind father figure, but actually expects only hostility and rejection, so he is basically hostile toward them and unable to relate to them in other than a highly manipulative way, trying to extort approval, esteem, and material gain. When peaceful efforts fail, hostility may break through his defenses in physical violence.

"Women are reacted to similarly, unless they satisfy his needs for passivity, dependence and external narcissistic supply. Nurturant mother figures are initially accepted, and he is able to relate to them at an infantile level, but any non-satisfaction of demands may lead to an outbreak of hostility,

quite possibly in the form of acute psychosis and homicidal violence. [124]

“Diagnosis: The present personality structure is felt to have existed prior to the appearance of epilepsy, which, however, is an important psychological threat to this particular structure. The primary reaction tendencies seem to lie at an undetermined point on the conscious-unconscious continuum from psychopathy to hysteria, with compulsive tendencies supporting a precarious neurotic adjustment. Though not psychotic at present, the patient is felt to be extremely subject to acute psychotic break. Under stress, obsessive, compulsive tendencies are manifest in paranoid schizophrenia.

“Prognosis: Factors making for an unfavorable prognosis are the patient’s immaturity and lack of insight, the brittle control of hostility, and the fact that his intellectual ability is below his conscious self-evaluation and the expectancies others may have about him. He needs protection, support, and success in terms of money, sex, and assurances of power. He is very dependent on external sources of narcissistic supply. Without a protected environment and immediate gratification of needs, prognosis is very poor; with these, guarded.

“It is felt that the patient would have a fairly good prognosis for psychotherapy in a protected environment initially low on outside sources of narcissistic gratification. Under other circumstances he would probably not be amenable to psychotherapy.

“Summary: The patient’s narcissistic needs are [125] very extreme and combined with unconscious

fear of their frustration to support unacknowledged hostility and panic. Object relationships are infantile. He can relate to nurturant mother figures as long as the roles are unconscious. With others he interacts in an evasive and manipulative manner, involving third persons to do his manipulating whenever possible.

“He defends against hostility, dependency, feelings of inadequacy, and panic by suppression, repression, denial reaction formation, grandiosity, ego expansion, compulsivity and probably disassociation. If present, disassociation is very important in the total dynamics; but the possibility of interpreting the same behaviors as evidence of psychopathy cannot be overlooked.

“The patient is presently neurotic, with strong likelihood of recurrence of psychosis, manifested by interpersonal violence.

“Prognosis is poor. It is felt that the prognosis for psychotherapy would be reasonably good, but that he would be amendable to its initiation only in the absence of outside sources of narcissistic supply.

“Presented by: F. Crefts and R. Wirt.

“Approved by: Richard C. Hamister, Ph.D., Supervisor, Testing Section, Clinical Psychology Service.”

And that's the end of that particular report. And then we can have the Veterans Administration Hospital in Palo Alto, the report of hospitalization for insurance purposes, dated [126] December 28, 1950,

admitted into evidence, a report of the Veterans Administration Hospital of the United States.

The Court: That's Exhibit M for identification?

Mr. Fluharty: "N" as in "Nellie".

The Court: Oh, "N". What happened to "M"? Are you passing it?

Mr. Fluharty: I'm sorry, I got a little out of order.

The Court: Do you want to back up and take "M"?

Mr. Fluharty: Yes, please. I am sorry. We will pass Exhibit "M".

The Court: All right. Then come to "N", and that that Palo Alto Veterans Hospital Report on Examination for Insurance Purposes?

Mr. Fluharty: That's correct.

The Court: It may be received in evidence as——

The Clerk: Plaintiff's Exhibit N admitted into evidence.

(Report of hospitalization for insurance purposes marked Plaintiff's Exhibit N in evidence.)

Mr. Fluharty: The last paragraph of Exhibit N:

"As expected prognosis regarding future psychotic break is highly guarded. As regards his epilepsy, he at the present time has no seizures, however it is felt that this is due to his continuing passive living while in the hospital situation. It is noted by the patient that these seizures come and go directly related to his emotional tension, and it is felt these may recur as emotional tension becomes unbearable." [127]

Now, the next——

Mr. Perillat: If it please the Court, at this time I am going to ask Counsel to read the very next paragraph, which is the closing summary of this entire report, entitled "Diagnosis."

The Court: He may comply with your request if he wishes, otherwise you can read it.

Mr. Perillat: I'll read it, your Honor.

Mr. Fluharty: I'd rather, thank you. Now, your Honor——

Mr. Perillat: Excuse me. May I read it at this time, your Honor, to complete the thought trend, because it was part of the same report counsel was reading.

The Court: No, it's more orderly—do I understand you to say you decline to read it?

Mr. Fluharty: Well, sure, I'll read it.

"Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic, mild, in complete remission, manifested by frequent epileptiform seizures, agitated combative impulsive behavior, irritability, paranoid trends, and periods of mental confusion. Seizures controlled. (2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn. (3) Fracture, skull, basal, right, sustained in epileptic seizure November 10, 1949, history of.

"Status: Discharged December 22, 1950, Maximum Hospital Benefit. Was committed. Competent. Has no guardian. [128] Had full ground and pass privileges.

"Signed: R. S. Mowry, M.D., Medical Officer.

"J. T. Ferguson, M.D., Chief, continued treatment service.

"Approved: J. M. Wallner, M.D., Chief, Psychiatry."

The Court: Very well.

Mr. Fluharty: Now, the next one, your Honor, of course, is a certificate to which arguments were given to the Court yesterday. At this time I offer into evidence this certificate which we argued about. It's Exhibit O for identification.

Mr. Perillat: If the Court please, before we move on to this, I have a motion regarding all of the prior testimony up to this point, which I should like to make at this time.

The Court: Very well. I will hold reacting to the offer of the Exhibit O for identification, and what is your motion?

Mr. Perillat: At this time, your Honor, we move to strike all of the testimony offered in the Exhibits A through N, the reading of which has been brought out into evidence, on the following basis: No. 1, that the final diagnosis of the evidence of plaintiffs impeaches all of the previous evidence. There is no evidence which lays a foundation to connect the epilepsy to any organic brain disease, and in the absence of such a connection there is no evidence whatsoever that following the discharge of this veteran on December 22, 1950, from the hospital, that he was incompetent. To the contrary, he was [129] discharged as competent, and on that basis I move to strike all the prior testimony on the basis that it has no connection whatsoever with an act performed by this veteran on April 21, 1950.

Mr. Fluharty: Your Honor, as already indicated in our opening arguments, we are attempting to show a trend. The fact that the veteran began with a blow on the head, suffered epilepsy, became increasingly severe, began having——

The Court: Well, I understand your theory. I don't think you should be arguing the motion in the presence of the Jury. I am going to deny the motion.

Now, as to Exhibit O for identification——

Mr. Fluharty: And with respect to that, your Honor, I have here, so that there is no mistake about the authenticity of Exhibit O being a County document, I have another document which is a similar document, but secured from a higher organization in our State Government, and I would like to have that marked as next in order for identification.

The Court: That will be marked O-1 for identification.

The Clerk: Plaintiff's Exhibit O-1 marked for identification.

(Certified copy of death certificate with attached authentication marked Plaintiff's Exhibit O-1.)

Mr. Fluharty: This document is a duly certified copy of the records of Public Health, State of California, and authenticated [130] by the Secretary of State of the State of California by the Seal of the State of California.

The Court: They really believe in big seals in this State, as well as big trees, big seals.

In view of our discussion at the pretrial confer-

ence, I will admit this document with one section deleted where it does not, I am advised, comply with the California State Law; namely, the word filled in this section on 29-A on the certificate.

Mr. Perillat: That is our only objection to that; it does not comply with the law. With that removed, we have no objection.

The Court: The Clerk will paste that over.

Mr. Fluharty: I might say that I am not stipulating to this, your Honor, because I talked to the Secretary of State this morning——

Mr. Perillat: To which I object as highly improper.

The Court: I didn't ask for any argument.

Mr. Fluharty: I am sorry.

The Court: Very well. The one with the great big pretty seal is more of an original than the marked Exhibit O for identification, so let's use Exhibit O-1 for identification, and that part there, paste something over it.

The Clerk: All right, sir.

The Court: The document thus restricted, [131] Exhibit O-1 for identification, may be received in evidence.

The Clerk: Plaintiff's Exhibit O-1 admitted into evidence.

(The document previously marked Plaintiff's Exhibit O-1 for identification was received in evidence.)

The Court: Fine. Like most Clerks, you are a jack of all trades.

Mr. Fluharty: Thank you.

This, ladies and gentlemen of the Jury, is a certificate from the State of California, Department of Public Health, in which Malcolm H. Merrill, M.D. certifies this is a true copy of the document filed in that Department's office, and it is entitled "Certificate of Death; date of death March 16, 1952, 8:05 A.M.

"Name of deceased, William Ellsworth Gardner."

Further down in the section it says: "Disease or condition directly leading to the death, Bronchopneumonia. Antecedent causes due to barbituate poisoning."

And it is signed by Ethal A. McKenzie, the local Registrar.

Next in order, your Honor, is Exhibit P, which is a letter from the Veterans Administration, signed by R. J. Hinton, Director, Dependents and Beneficiaries Claims Service, dated September the 20th, 1957, which is a certification as to the status of the beneficiary's record with respect to this particular insurance policy, and it has been admitted as genuine under the stipulation. [132]

Mr. Perillat: To which I object as incompetent, irrelevant and immaterial. There is no question about the status of the insurance in this case. That's a letter to Mr. Fluharty, your Honor.

Mr. Fluharty: It's a certification that is signed by Mr. Hinton which is an abstract of the records and which has been admitted to as genuine.

Mr. Perillat: It has no competency, materiality or relevancy in this proceeding, if it pleases the Court.

Mr. Fluharty: I believe this comes in as an abstract of Government records.

The Court: Objection is sustained. It's nothing but a letter to the attorney who is an interested party, but I understand there's no dispute but what the veteran's record shows the last designated beneficiary was in favor of Mr. Perillat's clients.

Mr. Perillat: That's true.

Mr. Fluharty: Yes, sir.

The Court: We are trying to prove the prior designation was Mr. and Mrs. Gardner. You can't do it by that letter.

Mr. Perillat: If the Court please, if it will assist counsel, I will stipulate the previously designated beneficiaries were Mr. and Mrs. Glaser and Mr. George R. Gardner.

Mr. Fluharty: I will accept that.

The Court: In view of that so-called stipulation, [133] as we lawyers call it, a stipulation is an agreement as to a fact which you may accept as evidence.

Mr. Perillat: If the Court please, may I ask counsel to show each of these documents to you that he is about to enter into evidence? I feel they are incompetent, irrelevant and immaterial.

The Court: Incidentally, did you both find the case I referred to you last night?

Mr. Perillat: The case of Judge Wigg?

The Court: Yes.

Mr. Perillat: Yes.

The Court: Fine. 226 Fed. 2nd, page 475, at 482. All right, this is a different type of document.

Mr. Perillat: An entirely different type of document. I have no objection as to a foundation on this except it is wholly immaterial and wholly irrelevant and not within the issues of the case.

The Court: I understand you to be making that objection unless you otherwise indicate as we go along?

Mr. Perillat: Yes, my request is the Court would examine these documents.

The Court: Let's have an offer, first, so I will have something to perform on.

Mr. Fluharty: Yes. The next documents which I offer, your Honor, are to show the marital status of the veteran and [134] the natural objects of his bounty, his family relationships, children, if any, brother and sister and mother, and I wish to show by this one document the fact of his marital status at the time.

Mr. Perillat: Well, if the Court please, that is not in issue here.

Mr. Fluharty: I think, since the test is set up in the Taylor case, your Honor, based on the natural objects of the bounty, I think we have to bring in who are the natural objects of the bounty.

The Court: You make an offer and I will rule on it.

Mr. Fluharty: Will you mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: Plaintiff's Exhibit Q marked for identification.

The Court: May I see it after you mark it?

The Clerk: Yes, your Honor.

(Interlocutory judgment of divorce and final decree of Bonnie Lucille Gardner and William E. Gardner marked Plaintiff's Exhibit Q for identification.)

The Court: This is a certified copy of the divorce decree. For what purpose do you make an offer of this document?

Mr. Fluharty: To show that at the time of the designation of the beneficiary that the man was unmarried and that the [135] mother of the two children was no longer married to him.

Mr. Perillat: If the Court please, this very lady has filed a disclaimer of any interest in this proceeding.

The Court: The document is irrelevant to the issues here on trial. The objection is sustained.

Mr. Fluharty: All right. Would you kindly mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: Plaintiff's Exhibit R marked for identification.

(Birth certificate of James Robert Gardner was marked Plaintiff's Exhibit R for identification.)

Mr. Perillat: My same objection to this one.

The Court: This is a birth certificate. For what purpose is it offered?

Mr. Fluharty: To show the decedent had children and that they are natural objects of his bounty, your Honor.

Mr. Perillat: If the Court please, it is a stipu-

lated fact by the pleadings there is children of this marriage. The mother has filed a disclaimer.

The Court: For herself.

Mr. Perillat: For herself.

The Court: But you agreed at the time, and do you stipulate that at the time of the designation in question, April 30, 1951, the veteran had two children living?

Mr. Perillat: I stipulate to that, your Honor.

The Court: Do you accept it? [136]

Mr. Perillat: Accept the stipulation.

The Court: Very well, in view of that, the document is superfluous, and that, too, is a fact the jury may consider as being in evidence, that the veteran at the time of the designation of beneficiary here in dispute had living two children by his first marriage.

Mr. Fluharty: There's one other——

The Court: The two children being minors.

Mr. Fluharty: I was thinking the age was material, the date of birth.

The Court: I have no objection to it.

Mr. Perillat: Minor children, I have no objection.

Mr. Fluharty: All right. Well, then, would you stipulate to the birth dates?

Mr. Perillat: Well, the birth dates would be on those birth certificates. Read them, if you wish. Subject to the Court's——

The Court: Yes.

Mr. Fluharty: All right. One of the minor children was born on July 2, 1941.

The Clerk: Do you want that marked for identification?

The Court: No.

Mr. Fluharty: And the other one, may I have it please?

The Court: This is part of the stipulation? [137]

Mr. Fluharty: Yes, your Honor.

The Court: And the other child was born?

Mr. Fluharty: On May 6, 1946.

The Court: Very well. That is agreed to, ladies and gentlemen of the jury, and you may accept that as a fact. And from those dates, of course, you may calculate the age of the children as of the date of the designation of the beneficiary in dispute, which was April 30, 1951.

Mr. Fluharty: Mark this Plaintiff's next in order for identification, please.

The Clerk: Plaintiff's Exhibit S marked for identification.

(Judgment of mental illness was marked Plaintiff's Exhibit S for identification.)

The Court: Yes.

Mr. Perillat: That being the matter your Honor has already received in evidence, I will not renew my objection.

The Court: Very well. "S" will be received, it being a judgment of the Superior Court of California.

The Court: Plaintiff's Exhibit S admitted into evidence.

(The document marked Plaintiff's Exhibit S for identification was received in evidence.)

Mr. Fluharty: Ladies and gentlemen of the jury, this is a duly certified, authenticated copy of order issued by the Superior Court of the State of California, in and for the [138] County of Sacramento, on a proceeding No. 8974. It's entitled The People for the Best Interest and Protection of William E. Gardner, Jr., as a Mentally Ill Person, Respondent; and it's entitled, "Judgment of Mental Illness and Order for Care, Hospitalization or Commitment." It was filed October 10, 1950. Stamped "C. C. La Rue, Clerk, by Franch, Deputy." It recites in the pertinent divisions as follows:

"On this 10th day of October, 1950, William E. Gardner, Jr., a person alleged to be mentally ill, was brought before me in open court for a hearing and examination on an allegation of mental illness, and there having been presented to me the Petition of Leslie Cox, alleging that William E. Gardner, Jr., is mentally ill, and an Order of Detention issued thereon by a Judge of the Superior Court of this County, and a return of the said Order;

"And it further appearing that the provisions of Article 3 of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code have been complied with;

"And it further appearing that Dr. E. M. Wilder and Dr. B. F. Howard, two regularly appointed and qualified Medical Examiners of this County, have made a personal examination of the alleged

mentally ill person, and have made and signed the certificate of the Medical Examiners, which certificate is attached hereto and made a part hereof.

“Now, therefore, after examination and certificate made as aforesaid the Court is satisfied and believes that William E. Gardner, Jr., is of such mental condition that he is in need of supervision, treatment, care or restraint.

“It is ordered, adjudged, and decreed that William E. Gardner, Jr., is a mentally ill person, and that he be committed to a facility of the Veterans Administration or other agency of the United States, to-wit: Veterans’ Hospital at Palo Alto, in accordance with the provisions of Section 1663 of the Probate Code of the State of California.

“It is further ordered and directed that the Sheriff of this County take, convey, and deliver William E. Gardner, Jr. to the proper authorities of the hospital or institution designated herein, to be cared for as provided by law.

“Dated this 10th day of October, 1950.

“J. L. Henry,
“Judge of the Superior Court.”

Certified by the County Clerk of the County of Sacramento as follows:

“State of California,
“County of Sacramento—ss.

“I, C. C. LaRue, County Clerk and Ex Officio

Clerk [140] of the Superior Court of the County of Sacramento, do hereby certify the foregoing to be a full, true and correct copy of the original Petition, Order for Detention, Certificate of Medical Examiners, and Order of Commitment on file in my office.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this 10th day of October, 1950.

“C. C. LaRue, County Clerk,
“By Franch, Deputy.”

Now, your Honor—would you mark this Plaintiff’s next in order for identification?

The Clerk: Plaintiff’s Exhibit T marked for identification.

(Certificate of County Clerk of County of Sacramento, was marked Plaintiff’s Exhibit T for identification.)

Mr. Fluharty: This certificate yesterday, your Honor, was argued, and you indicated you would not allow it, but I wish to offer it as a formal offer.

Mr. Perillat: To which I renew my same objection.

The Court: What is this thing?

Mr. Fluharty: This is the certificate——

The Court: I see. Yes, I will decline to accept this in evidence for your own evidence shows it is superfluous and unnecessary. [141]

Mr. Fluharty: Thank you, your Honor.

I now call Mr. George Robert Gardner.

GEORGE ROBERT GARDNER

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: George Robert Gardner.

The Court: Age?

The Witness: 32.

The Court:: Residence?

The Witness: Sacramento, California.

The Court: Occupation?

The Witness: Teacher.

The Court: Where?

The Witness: Sacramento State College.

The Court: And are you a citizen of the United States of America?

The Witness: Yes, I am.

The Court: Exclusively?

The Witness: Yes.

The Court: All right. Take the witness.

Mr. Fluharty: Thank you, your Honor.

Direct Examination

Q. (By Mr. Fluharty): Your name is George Robert Gardner? A. Yes.

Q. You are one of the Plaintiffs herein? [142]

A. Yes.

Q. And you are related to the decedent?

A. Yes.

Q. And what is your relationship, sir?

A. Brother.

Q. You are the brother? A. Yes.

Q. Are you aware of the nature and extent of his family?

(Testimony of George Robert Gardner.)

Mr. Perillat: To which I object. It's incompetent, irrelevant and immaterial. It's already been proved.

Mr. Fluharty: I think, your Honor——

The Court: What's the purpose?

Mr. Fluharty: To show the nature and extent and object of his bounty.

The Court: This is on the theory you indicated yesterday that you thought was applicable?

Mr. Fluharty: Your Honor, at this time I would like to make a formal offer of proof, because this will be throughout——

The Court: All right. I will excuse the jury when I hear the offer of proof. Will you step into the jury room just temporarily, please? If it's something I think you should hear I'll call you back.

(Whereupon the jury retired from the court room.)

The Court: The jury is now absent.

Mr. Fluharty: Your Honor, at this time, [143] yesterday I asked to have presented this letter of September 14 for the purpose of showing a constructive trust and it was denied. Of course, I am——

The Court: Now, wait just a minute. Maybe you better make your offer here to protect your record and get a ruling during the course of the trial. I have noted the jury is absent. You can do it now. This offer of proof I understood you to be making was with respect to what this witness will prove.

Mr. Fluharty: He will prove the signature.

(Testimony of George Robert Gardner.)

The Court: Oh, all right. I didn't understand.

Mr. Perillat: If I may interrupt the Court.

The Court: Yes.

Mr. Perillat: Do I understand for the purpose of the record we will go through as far as this specific objection is concerned? We argued this at length yesterday, this business of constructive trust and it was my understanding it was part of the pre-trial order made in reference to this.

The Court: It's controlling even though I will not tolerate any extensive argument of it. He may protect the record to make an offer.

Mr. Fluharty: Yesterday, in the Complaint we have one of the causes based on a constructive trust theory because of the letter that was written contemporaneously with the execution of September 14, 1950, beneficiary addressed to the witness, Mr. Gardner, and to the sister asking them to hold the [144] proceeds of the insurance for his children. It was our understanding a constructive trust arose. We were overruled by the Court. I might say I will ask for those instructions in order to protect my record.

Now, it is my theory, I have this letter of September 14 plus a series of letters written either to the mother or to the aunt or to the brother indicating the deep and abiding and great concern for the welfare of his children.

The Court: Well, now, wait. You are talking generally. You got a witness on the stand who said—you asked him something about the veteran's

(Testimony of George Robert Gardner.)

family, I think is the way you worded it, and there was an objection it was irrelevant, and you made an offer of proof in regard to what this man says.

Mr. Fluharty: I'll make an offer of proof as to each point. Is that all right?

The Court: All right.

Mr. Fluharty: The first point——

The Court: You offer to prove by this witness that——

Mr. Fluharty: That he has certain members of his family.

The Court: It's agreed he had a mother, he had a father, he had one wife, and he had two children, and then he had no wife, then he had a wife. What else do you need? And he's got a brother and sister who are Plaintiffs.

Mr. Fluharty: That's right. All right. [145]

The Court: What more can you prove?

Mr. Fluharty: It was merely preliminary, your Honor. I'm sorry. I don't want to take the Court's time. It's merely preliminary.

The Court: I know what you are getting at, but you may not be at it, at the point here.

Mr. Fluharty: It was a preliminary question. I intended to go on after that and then go into this other material which I now make the form of my offer, ask if he knew the members of the family, and his knowledge toward them, and his affection toward them, and then I was going to go into this other material.

The Court: Well, then, secondly, through this

(Testimony of George Robert Gardner.)

witness, you offer to prove, and I take it there will objection to it also, that he had certain affections for certain members of the family and demonstrated it by certain letters?

Mr. Fluharty: That's correct, your Honor.

The Court: All in the theory, as you indicated yesterday, that, although this is a contract, it is governed by some California law——

Mr. Fluharty: No, your Honor. I intend to bring it in on the theory of intent—or under the theory of intent to make a new will. I have cases on this. That the intent of the testator or the maker of the contract, or of a deed, the declarations made before at and after the time are all admissible in order to show the intent at the time of the making of this [146] particular act. Now, there are a number of cases on this, and all of them agree that it's true that they are hearsay, but they don't come in for the truth or falsity of the statement. They come in for the purpose of showing the state of mind of the declared.

The Court: When?

Mr. Fluharty: They come in when they are offered, which is now.

The Court: The only state of mind we might possibly be interested in, and definitely are interested in, is April 30, 1951.

Mr. Fluharty: That's right. Now, in order to show the state of mind on April the 30th, 1951, according to the cases, you can bring in declarations made before, at the time, and afterward, in

(Testimony of George Robert Gardner.)

order to create the surrounding state of mind. As I understand it from reading the cases that it is hearsay, but it comes in as an exception to the hearsay rule because you are not bringing them in for the truth or falsity, but only to show the state of mind.

The Court: I think we are ahead of ourselves here. Let's stop because we are anticipating things. Call the jury back, please.

(Whereupon the jury returned to the court room.)

The Court: The jury is now present. The record may so show. [147]

The question put to the witness called for him to tell of the decedent's family. I forget the exact wording of it. Do you have it, Mr. Reporter?

(Question read.)

The Court: Rephrase the question.

Mr. Fluharty: Yes, your Honor.

The Court: And don't answer it for a moment because there will be an objection, I gather. Go ahead.

Q. (By Mr. Fluharty): Were you a member of the family circle of the decedent here?

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant and immaterial. He's the uncle. There is no issue raised on that point in this case.

The Court: Sustained.

Mr. Fluharty: All right.

Q. Calling your attention to the day of approxi-

(Testimony of George Robert Gardner.)

mately, on or about September the 9th of 1950, did you have occasion to see the decedent?

A. Yes, I did.

The Court: Excuse me. Let me get that date again?

Mr. Fluharty: September the 9th, 1950.

Q. When did you see him?

A. I saw him just after he arrived at the airport in the morning I picked him up, took him over to see his boys.

Q. Do you recall what date that was?

A. September 9th. [148]

Q. And the day of the week?

A. Saturday.

Q. And it was the Municipal Airport in Sacramento? A. Yes, it was.

Q. Was there any other person with you?

A. My sister.

Q. The Plaintiff herein? A. Yes.

Q. Mrs. Glaser. About what time on Saturday morning was that?

A. I think it was about noon.

Q. And you picked him up at the airport. Now, where did you go?

A. We went to my aunt's house where his boys were staying.

Q. And how long did he stay there?

A. Well, several hours, and then we took him over to our home with the boys, and we took him back to the airport in the evening.

Q. Now, during the course of the day, then, you

(Testimony of George Robert Gardner.)

had occasion to go to your house, you and your sister, the decedent and the two boys, is that correct? A. Yes.

Q. Now, while you were at your house, did you have occasion to have conversation? A. Yes.

Q. With the decedent? A. Yes. [149]

Q. And did he make any statements to you with respect to his insurance policy?

Mr. Perillat: To which I object on the basis of its incompetency, irrelevancy, and immateriality. The decedent's executed designation of a policy is the best evidence thereof, and further this is hearsay.

The Court: Sustained.

Q. (By Mr. Fluharty): Did he make any statements to you with respect as to whether you should take care of his children?

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. (By Mr. Fluharty): This was on September the 9th. Did you have occasion to observe his mental state at that time?

Mr. Perillat: To which I object on the basis it calls for a conclusion of this witness, your Honor.

Mr. Fluharty: Your Honor, I offer this as an opinion of a lay witness, mental status is considered—my understanding it is considered admissible of people who have been long in contact with each other, members of the family.

Mr. Perillat: That's the basis of my objection,

(Testimony of George Robert Gardner.)

if I may be heard. There's no showing of a continued observation, and I believe the statute in California requires they be intimately acquainted [150] for a long period of time.

The Court: Sustained.

Mr. Fluharty: Will you mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: That's Plaintiff's Exhibit U marked for identification.

(Letter from decedent was marked Plaintiff's Exhibit U for identification.)

Mr. Fluharty: At this time, your Honor, I wish to offer this into evidence based on the offer of proof which was made before. I would like to lay a foundation, if necessary.

Mr. Perillat: I don't know what that is, your Honor, so I cannot—may I approach the Bench?

Mr. Fluharty: This is the one set out in the Complaint.

Mr. Perillat: My objection is made to this.

The Court: You better make it now.

Mr. Perillat: We object to this letter on the basis it is incompetent, irrelevant, and immaterial. It is not within the scope of any issues framed by the pleadings in this case.

The Court: Sustained.

Mr. Fluharty: All right. All right, that's all of this witness. Thank you, Mr. Gardner. You may cross examine.

Mr. Perillat: No cross examination, Mr. Gardner. Thank you.

The Court: You are excused. Next witness. [151]

Mr. Fluharty: Next witness, your Honor, will be the sister, the same line of information is offered and——

The Court: You do what you want, and I'll make my rulings.

Mr. Fluharty: All right. Mrs. Glaser, please.

HELEN GLASER

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

The Court: May we have your name, please?

The Witness: Mrs. Helen Glaser.

The Court: You are one of the Plaintiffs in this case?

The Witness: Yes, I am.

The Court: Speak good and loud, please.

The Witness: Yes.

The Court: You may either tell me your age, or you are over 21.

The Witness: I am 35.

The Court: Housewife?

The Witness: Yes, mother.

The Court: And where do you live?

The Witness: In Sacramento.

The Court: Are you a citizen of the United States of America?

The Witness: Yes, I am.

The Court: Only? [152]

The Witness: Yes.

The Court: All right. Take the witness.

(Testimony of Helen Glaser.)

Direct Examination

Q. (By Mr. Fluharty): Your name, please?

A. Helen Glaser.

Q. Are you related to the decedent?

A. Yes, I am, I am his sister.

Mr. Fluharty: May I lay a foundation with respect to this letter?

The Court: You proceed on whatever you want to do, and I'll make my rulings.

Mr. Fluharty: All right.

Q. I show you Plaintiff's Exhibit U for identification and ask you if you have ever seen this before?

A. Yes, I have.

Q. And do you recognize the signature?

A. Yes, my brother Bill's signature. The letter in my brother's handwriting.

Q. And you are familiar with his handwriting?

A. Yes, I am.

Q. And you received this letter?

A. Yes, my brother and I did.

Q. And you received it in Sacramento?

A. Yes.

Q. At or about September 14, 1950? [153]

A. Yes.

Mr. Fluharty: At this time, your Honor, I wish to offer this in evidence once again.

Mr. Perillat: To which I object—

The Court: I didn't hear.

Mr. Fluharty: I offer into evidence Plaintiff's Exhibit U for all purposes.

Mr. Perillat: To which I object on the basis it's

(Testimony of Helen Glaser.)

incompetent, irrelevant, and immaterial. It does not fall within the issues framed within the pleadings in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): Calling your attention to September the 9th, 1950, did you have occasion to see the decedent? A. Yes, I did.

Q. And when did you see him on that day?

A. I was with my brother when we picked him up and took him over to——

Q. That was on Saturday morning, is that correct?

A. Yes, Saturday morning, and during the day, Saturday, I was with him.

Q. And you had the children with you, his two children? A. Yes.

Q. And you took them to your home?

A. Yes.

Q. Now, during the course of the day, did you have occasion to have conversations with Mr. Gardner? A. Yes, we did, we talked—— [154]

Mr. Perillat: Excuse me. Object to the witness volunteering an answer, if the Court please.

The Court: She was asked if she had conversations with the decedent. All you need to do is answer the questions as asked. Don't go on. However, there has been no damage done, but don't relate the conversation if you are asked to unless there is no objection.

The Witness: All right. Thank you.

Q. (By Mr. Fluharty): During the course of

(Testimony of Helen Glaser.)

the day, did you have a conversation with the decedent? A. Yes.

Q. And who was present besides yourself?

A. Well, my brother when we talked to him.

Q. You had one conversation then when your brother was present? A. Yes.

Q. Was anyone else present?

A. Not at this time, no.

Q. And where was the conversation held?

A. At 815 - 28th Street.

Q. You were in a room by yourselves?

A. Yes.

Q. Now, what was the subject of the conversation?

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant and immaterial. [155]

The Court: Not until I know what the subject was. Proceed. You may answer, just the subject.

The Witness: What was that question?

The Court: What was the subject of the conversation?

The Witness: The children, his love for the children, and the——

Mr. Perillat: To which I object.

The Court: Wait, wait. Let her finish. And what?

The Witness: He spoke of us taking——

The Court: No, just asked for the subject of the conversation.

The Witness: He spoke of leaving his insurance money to the children, and he wanted us to see that we could give—help take care of the children.

(Testimony of Helen Glaser.)

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant and immaterial, and move the Court to strike the entire answer.

The Court: It may go out. The jury is instructed to disregard it. It does not relate to any of the issues framed by the pleadings here.

Q. (By Mr. Fluharty): Did you have an opportunity to observe his demeanor, his mental state at that time? A. Yes, I had.

Q. What was his mental state? Don't answer until——

Mr. Perillat: I renew my objection. It calls for [156] a conclusion of the witness which I believe she can only testify to the facts she observed, and not the conclusion she may have drawn from those facts; and, furthermore, if these facts are offered to show competency or incompetency, there's no foundation laid as required by the statutes of evidence in California.

The Court: Sustained.

Mr. Fluharty: All right.

Q. On the day in question was he irrational?

A. No.

Mr. Perillat: To which I object. It is a conclusion of the witness.

The Court: Sustained. The answer may go out.

Mr. Fluharty: All right. That's all. You may cross examine.

Mr. Perillat: No cross examination.

The Court: You are excused. Next witness.

Mr. Fluharty: Mrs. Gardner.

(Addressing Clerk) Will you mark these two as Plaintiff's next in order for identification, please?

LELIA G. GARDNER

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Q. (By the Court): Will you please state your name?

The Witness: Lelia G. Gardner.

The Court: And you may either tell us your age or—— [157]

The Witness: I am 64 years old.

The Court: Where do you live?

The Witness: 2618 X Street, Sacramento.

The Court: And are you a housewife?

The Witness: Yes.

The Court: You are not employed, in other words?

The Witness: Well, I have a little business of my own.

The Court: What is your occupation?

The Witness: It's a six-bed combo convalescent home.

The Court: And are you a citizen of the United States of America?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: All right. Take the witness.

The Clerk: Plaintiff's Exhibits V and W marked for identification.

The Court: V and W for identification.

(Two photographs of decedent were marked

(Testimony of Lelia G. Gardner.)

respectively Plaintiff's Exhibits V and W for identification.)

Mr. Perillat: To which I object on the basis they are incompetent, irrelevant and immaterial, and do not tend to prove any issues raised in the case.

The Court: I haven't heard they were offered.

Mr. Perillat: Excuse me, your Honor. [158]

Mr. Fluharty: I haven't offered these yet, counsel.

Mr. Perillat: I beg your pardon.

Q. (By Mr. Fluharty): I show you Plaintiff's Exhibit No. V for identification, and ask you if you have seen this before?

A. Yes, I have. That's William.

Q. That's picture of William?

A. Yes, at the time of his graduation.

Q. And when was that?

A. Well, it was about '41—no, wait a minute. Now, I don't know. I just don't remember. '42, I guess it was, in Ft. Monmouth, '42.

Mr. Perillat: Excuse me. I object to even the foundation on these on the basis they do not tend to prove any issue in this case, your Honor.

The Court: What is the purpose?

Mr. Fluharty: It's for the purpose of acquainting the jury with the deceased, your Honor, show the surrounding circumstances of this whole case.

The Court: All they need to know is there was such a person who did live, who did have insurance, who made certain designations of beneficiary, good,

(Testimony of Lelia G. Gardner.)

bad, or indifferent, not being the issue, and that he died. It may look very interesting, but it doesn't help us decide any of the issues.

Mr. Perillat: It doesn't help us decide what happened on April 30, 1951.

The Court: Sustained.

Mr. Fluharty: May I offer these and have them denied?

The Court: Surely. [159]

Mr. Fluharty: I offer those in evidence for all purposes.

The Court: V and W for identification—the objection voiced to V is renewed as to W?

Mr. Perillat: It is, your Honor.

The Court: Same ruling as to both. Interesting as they may be, the pictures do not help us solve the issue here on trial.

Mr. Fluharty: If you will mark those next in order for identification, please.

The Clerk: That's Plaintiff's Exhibit X marked for identification. There is some loose photographs in here also, counsel.

Mr. Fluharty: Well, I was going to say, each one of them.

Mr. Perillat: The Court please, what is coming up is merely more repetition of the same thing.

The Court: Well, that may be. There's nothing before me.

Mr. Fluharty: Your Honor, I am getting my case taken away from me. I think counsel should be instructed to stay at the table.

(Testimony of Lelia G. Gardner.)

The Court: I don't know what your rules and regulations are, but, certainly, when he has need to voice an objection, he has to stand.

The Clerk: Plaintiff's Exhibits X, Y, Z, and AA, marked for identification. [160]

(The four photographs referred to were marked respectively Plaintiff's Exhibits X, Y, Z and AA, for identification.)

The Court: However, I will ask Mr. Perillat not to anticipate.

Mr. Perillat: My trouble here, the witnesses have been identifying and answering these questions before I have an opportunity to make my objection.

The Court: All right. That was possibly true of the last witness, but not this one. Proceed.

Mr. Fluharty: Thank you, your Honor.

Q. I show you Plaintiff's Exhibit X for identification and ask you if you have seen this before?

A. Yes, I have.

Q. And what is it? A. That's William.

Mr. Perillat: To which I object. It's incompetent, irrelevant, and immaterial, does not tend to prove any issue in this case.

The Court: It being another picture of the veteran?

Mr. Perillat: No, your Honor.

Mr. Fluharty: No, your Honor. It's not. It's a picture of one of the children. This comes in to show the objects of his bounty.

The Court: The objection is sustained. [161]

Mr. Fluharty: All right. May I offer then, into

(Testimony of Lelia G. Gardner.)

evidence for all purposes—or should I lay a foundation as to each or—they are all the same, but I want to make the offer, your Honor.

Mr. Perillat: I will stipulate, if it will help your Honor, the foundation has been laid, but renew my objection to their admissibility.

The Court: All right. And you are offering them?

Mr. Fluharty: Yes, your Honor, Plaintiff's Exhibit X, Y, Z and AA.

The Court: They all being photographs of the veteran's children?

Mr. Fluharty: Veteran's children and one of them is a picture of the veteran and one of the children, and another one the veteran and his wife and one of the children, and the other another child.

The Court: They do not help us solve any of the issues in this case; and, therefore, the objection is good as to each. No question but what he does have two children or did have two children and a wife, No. 1.

Mr. Fluharty: Your Honor, I have here a sheaf of correspondence that I would like to offer into evidence, and I think counsel would like to look at it; possibly we could take our afternoon recess while he goes over them.

The Court: All right. We will take our afternoon recess.

(Recess.) [162]

The Court: Note the presence of the jury. You may continue.

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Plaintiff's next in order for identification.

The Clerk: That will be Plaintiff's Exhibit AB, marked for identification.

(Letter to mother of decedent from decedent was marked Plaintiff's Exhibit AB for identification.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you what purports to be a letter dated January 5, 1948, written from the Biltmore Hotel, Los Angeles, to "Dear Mom," signed "I love you, Bill." Do you know this document?

A. Yes, it's William's handwriting.

Q. That's his signature at the bottom?

A. Yes, that's his signature.

Q. And the letter was addressed to you, was it?

A. Yes.

Q. Did you receive it? A. Yes, I did.

Mr. Fluharty: I offer this, your Honor, into evidence as Plaintiff's Exhibit AB for all purposes.

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant, and immaterial. There's no foundation laid that it proves any issues involved in this action.

Mr. Fluharty: Once again, your Honor, we are offering these [163] letters to show the intent, state of mind of the decedent with respect to the natural objects of his bounty. Cases hold, and I have given the series of cases to your law clerk, with respect to this point that conditions before and at the time of the act and statements, declarations, although

(Testimony of Lelia G. Gardner.)

they are hearsay, do not come in for the truth or falsity, and that's the reason we are offering these documents.

Mr. Perillat: If the Court please, it is not the contention of this defense to urge this man did not love his mother, his brother, his sister, or anybody else, but I still maintain that this letter does not prove any issue in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): I show you another letter, Mrs. Gardner, what purports to be a letter dated July 23, 1948, addressed to "Hello Mom and Helen."

The Court: Was this marked for identification?

Mr. Fluharty: I am sorry, your Honor.

The Clerk: Plaintiff's Exhibit AC marked for identification.

(Letter from decedent to his mother and a Helen, marked Plaintiff's Exhibit AC for identification.)

The Court: In the interest of time, do you have a series of these letters all for the same purpose and same effect, all written to this lady?

Mr. Fluharty: Not all written to her, no, some of them to other members of the family, but I can get all of hers and separate them, if that is all right. [164]

The Court: Yes, because my ruling is going to be obviously the same to all of them.

Mr. Fluharty: All right. All of these are for the same purpose under the same offer.

(Testimony of Lelia G. Gardner.)

The Court: Very well. Mr. Clerk, you will mark them AC for identification.

The Clerk: AC has been already marked, your Honor. Plaintiff's AD for identification. Plaintiff's AE marked for identification, and Plaintiff's Exhibit AF is marked for identification.

(Three letters from decedent to his mother were marked respectively Plaintiff's Exhibits AD, AE and AF for identification.)

The Court: Very well. They are all offered in evidence for the same purpose heretofore indicated with respect to, and at the time Exhibit A was offered.

Mr. Fluharty: That's correct. Do you want me to authenticate——

Mr. Perillat: I'll stipulate to that and——

The Court: Your objection is the same?

Mr. Perillat: Yes.

The Court: Sustained to each.

Mr. Fluharty: Mark these next in order.

The Clerk: Plaintiff's AG marked for identification.

(Letter from decedent to his children marked Plaintiff's Exhibit AG for identification.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you a communication with the heading—it's Plaintiff's AG for identification, which purports to be a letter with the notation "P. O. Box 511, Santa Barbara, California, July 20, 1951," addressed to "Dear Billy and Jimmy." A. Yes.

(Testimony of Lelia G. Gardner.)

Q. It's signed "Your daddy loves you, Daddy." Do you recognize?

A. That's William's handwriting, yes.

Q. You are familiar with his handwriting, is that correct?

A. Yes, I have many letters from him.

Mr. Fluharty: Thank you. Your Honor, at this time I wish to offer into evidence the letter of July 20, 1951 in the handwriting of the decedent addressed to "Dear Billy and Jimmy", and for the same purpose showing the fact of the state of mind with respect to the natural objects of his bounty.

Mr. Perillat: To which I object as being incompetent, irrelevant, and immaterial, and not within the scope of this action. There is no issue as to whether or not this man loved his children, mother or sister.

The Court: Sustained.

The Clerk: Plaintiff's Exhibit AH marked for identification.

(Letter from decedent to Marie and Ken, marked Plaintiff's Exhibit AH for identification.) [166]

Q. (By Mr. Fluharty): Mrs. Gardner, I show you what purports to be a letter marked Plaintiff's Exhibit AH for identification which at the head states "P. O. Box 511, Santa Barbara, California," dated July 20, 1951, addressed to "Dear Marie and Ken," and signed "Yours truly, William E. Gardner."

I ask you if you have seen this before?

(Testimony of Lelia G. Gardner.)

A. Yes, that's a letter written to my sister, and she had his children at the time.

Q. And whose signature is this?

A. That's William's signature.

Q. That's the decedent? A. Yes.

Q. And you furnished me with this letter, is that correct? A. I think I did, yes.

Mr. Fluharty: At this time, your Honor, I offer into evidence Plaintiff's Exhibit AH for identification for all purposes, and I offer it into evidence for the purpose of showing that he had great affection and love for his children, the natural objects of his bounty, to show a state of mind at or near the time of the execution of the change of beneficiary.

Mr. Perillat: To which I object as being incompetent, irrelevant and immaterial. It does not prove any issues in this case. Also merely goes to show he also loved his aunt and uncle.

Mr. Fluharty: I didn't say that. [167]

The Court: I understood it was a letter to the aunt concerning the children.

Mr. Fluharty: That is right.

The Court: But it is not in issue in this case. The objection is sustained.

Mr. Fluharty: Thank you.

The Clerk: Plaintiff's Exhibit AI marked for identification.

(Document entitled "My last will and testament" of decedent, marked Plaintiff's Exhibit AI for identification.)

(Testimony of Lelia G. Gardner.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you Plaintiff's Exhibit AI for identification which bears the designation, "Sacramento, California, December 3, 1949," and heading is "My last will and testament", and the end is "Sincerely, William E. Gardner, Jr.," and ask you if you have seen this document? A. Yes, I have. He asked me——

Q. What is this document?

A. It is his——

The Court: Just a minute.

Mr. Perillat: To which I object to that question specifically on the basis that it calls for a conclusion of this witness. The document has not been proved to be a last will and testament by a court with proper jurisdiction.

The Court: The witness may answer, if she knows; and, if she [168] is going to use legal terms, unless that document has been probated as a will, you will have to say it is a purported will.

The Witness: That's what I would say; it is a purported will.

Mr. Fluharty: All right. Thank you. Your Honor, I offer this into evidence for all purposes, the offer being it shows once again the state of mind of the decedent prior to the execution of these changes of beneficiaries. There is no better way of finding the state of mind than by will, and I offer this in evidence for this purpose.

Mr. Perillat: To which I object; incompetent, irrelevant, does not prove any issue in this case.

(Testimony of Lelia G. Gardner.)

Does not prove a probate by a proper jurisdiction, and I wonder why it hasn't been.

The Court: Objection sustained.

Mr. Fluharty: Thank you, your Honor. I move the last statement of counsel be stricken. It is argumentative.

The Court: It may go out.

Q. (By Mr. Fluharty): Mrs. Gardner, you are the mother of the decedent, is that correct?

A. Yes.

Q. Referring your attention to September 9, 1950, did he visit you in Sacramento?

A. Yes, he visited me, my son George brought him there. He went to the Air Depot to pick him up.

Q. He visited you in your home, is that correct?

A. Well, for a short time between the period of visiting with my sister and going over to George's home.

Q. Approximately what time of the day was this, Mrs. Gardner?

A. Well, it was some time in the afternoon. I got a phone call from William between 11:00 and 12:00, saying he was at the air depot, airport, and I phoned George and had him go pick William up.

Q. Now, at the time you saw him were there other persons present?

A. Well, George and Helen were in the house, but I don't know if they heard anything we said.

Q. Then there was just the two of you——

A. Beg pardon?

(Testimony of Lelia G. Gardner.)

Q. The two of you were immediately present together there, is that correct?

A. Well, yes, we were together.

Q. And you had a personal conversation, is that correct?

A. Well, yes, in regards to the children.

Mr. Perillat: To which I object, your Honor——

Mr. Fluharty: Merely a foundation.

The Court: I can only hear one person at a time. Go ahead. You object to what?

Mr. Perillat: I object to the witness volunteering an answer and ask the last statement of the witness be stricken as non-responsive to the question. [170]

The Court: She had only gone to the point the conversation was about the children. That may stand.

Q. (By Mr. Fluharty): You had a conversation about the children then at this time, that place, and you and your son were present, is that correct?

A. Yes, he was concerned about his health.

The Court: Just answer the question.

Q. (By Mr. Fluharty): All right. Now, what was the conversation that took place?

Mr. Perillat: To which I object on the grounds it's incompetent, irrelevant, and immaterial, does not tend to prove any issue in this case.

The Court: Sustained.

Mr. Fluharty: Once again I would like to renew my offer, your Honor. This is coming in to show the state of mind of the decedent with respect to

(Testimony of Lelia G. Gardner.)

the natural objects of his bounty. It is not for hearsay, but merely for the purpose of showing the state of mind.

The Court: I understand.

Mr. Fluharty: Thank you, your Honor.

The Court: Ruling stands. As a matter of fact, other than those facts you are tending to prove, judicial notice could be taken, so there's no use wasting a great deal of time on them anyway.

Q. (By Mr. Fluharty): You recall, Mrs. Gardner, during the [171] course of reading excerpts from the medical record of the decedent, there was reference made in the Fort Miley report to the fact members of the family had removed him from the hospital against the advice of the hospital?

A. We didn't know—I didn't know that he was ill at the time he was in Fort Monmouth.

The Court: Just a minute. Please wait for a question. They haven't asked you a thing. The lawyer just talked. Just wait for the question.

Q. (My Mr. Fluharty): Now, did you remove Mr. Gardner from the hospital?

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant, and immaterial, and does not tend to prove any issue in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): Now, referring your attention to the 21st of November, 1949, did you see your son, Mr. Gardner?

A. 21st of November?

Q. I think for recollection purposes, about three

(Testimony of Lelia G. Gardner.)

days after his discharge from the hospital on the 18th of November.

The Court: 1949?

Mr. Fluharty: 1949, yes.

A. Yes.

Q. (By Mr. Fluharty): Now, did you see your son, Mr. Gardner, on that day? [172]

A. Yes.

Q. And where did you see him?

A. Well, he was in my home. I had brought him home from the Letterman Hospital.

Q. You brought him home? A. Yes.

Q. Did you bring him in the car or by train?

A. I brought him in the Superior Ambulance.

Q. And you brought him to your home, is that correct? A. Yes, I did.

Q. Now, what time did you arrive on this particular day?

A. Well, it must have been between 5:00 and 6:00. I remember the driver said we made good time.

Q. All right. Now, after you had arrived home, did you receive a phone call?

A. Well, after I arrived home that day? No, not that day.

Q. Well, did you receive a phone call the next day, then?

A. Well, it may have been the next day or the next, I just don't quite remember, but there was a phone call.

(Testimony of Lelia G. Gardner.)

Q. At or about the 21st of November, '49, is that correct?

A. Well, it could have been just about that time. It was the 18th I brought him home.

Q. Now, if you brought him home on the 18th, then it was around the 21st you got the phone call, is that it? A. Well, about that time. [173]

Q. All right. You received this phone call, is that correct?

A. I received the phone call.

Q. Who answered the phone?

A. Well, I answered the phone.

Q. And did the person on the other end identify herself? A. Yes, they did.

Q. And what did she say?

Mr. Perillat: To which——

The Court: Wait, wait. "They" and "She"? Persons?

Mr. Fluharty: Who was the person?

A. Well, the woman said she was Frances Gardner and I said "Well, you must have the wrong number. We haven't any Frances Gardner that I know of."

Q. And then what did the person on the other end of the line say? A. Well——

Mr. Perillat: To which I object.

The Court: Wait. Wait. There is an objection. What is the objection?

Mr. Perillat: The objection is, incompetent, irrelevant, and immaterial. There is no foundation

(Testimony of Lelia G. Gardner.)

laid that tends to prove any issue involved in this action.

Mr. Fluharty: This is preliminary. We are laying the foundation?

The Court: That doesn't tell me anything. For what [174] purpose do you offer this conversation?

Mr. Fluharty: I would like to make an offer of proof, if I could.

The Court: The jury may step outside.

(Whereupon the jury retired from the court room and the following proceedings were had outside of their presence and hearing.)

The Court: All right. The jury is absent. What is the offer of proof?

Mr. Fluharty: Your Honor, I wish to show by the testimony of this witness that Mrs. Hester, who at that time, of course, was not married to the decedent, called him, calling herself Mrs. Gardner, and that when the decedent talked to her on the phone during the course of this telephone conversation, he went into a psychotic incident, attempted to commit suicide by slashing his wrist and butting his head against the wall, and it was necessary to call an ambulance in order to restrain him.

The Court: 1949?

Mr. Fluharty: Yes, your Honor, 21st of November.

The Court: How does that help me decide, and the jury, decide whether or not the designation of beneficiary as of April 30, 1950, was a voluntary act?

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Well, to answer that, your Honor, very closely thereafter we showed the hospital records, and they [175] have already indicated he doesn't do well under tension, and that the relationship of Mrs. Hester was tenuous and not good for him, and we want to show by this the mere fact he received a phone call from her threw him into a psychotic incident and made him attempt to commit suicide as a result of the phone call from Mrs. Hester, which would certainly show the influence of her would fit into the prognosis, the highly guarded prognosis of the Medical Staff of the Letterman General Hospital. He had just been released a few days before, and he said any relationships would be bad for him.

The Court: What does it tend to prove? That he was insane or temporarily at the time of 1951 when he executed this change of beneficiary, or does it tend to prove, together with other evidence in this offer, this woman exercised undue influence upon him for the purpose of having him change the beneficiary, or what?

Mr. Fluharty: It shows this woman contributed to his mental state which we maintain, whenever he is under stress or excitement, would have a psychotic incident, and this is one example.

Mr. Perillat: Your Honor, may I be heard on this one point? There is no evidence at all that on April 30, 1951, this man had any psychotic incident. And furthermore, so far as—well, I won't go any further. [176]

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Of course, they are going to introduce into evidence a deposition to show the very day in question he wondered whether life was worth it. That's successful impeachment. Actually, we don't have the evidence. We have to have circumstantial evidence. Here it is our contention that the stress under which he was living with this woman when they were not married, and whenever she called him, would cause him to go into tremendous paroxysms of epileptic seizure, even have a psychotic seizure here, attempts suicide. Shows the whole picture.

The Court: It's 1949. I am interested in April 30, 1951. Is this the beginning of a series of things you are going to show, leading up to April 30?

Mr. Fluharty: It ties in to the medical report.

The Court: But it doesn't help me unless it continued until '51. If at the time he changed this beneficiary on April 30, 1951, he was under the spell of one of these hypnotic, whatever you call it, psychotic incidents, why, certainly that is very definite evidence, but he may have had one the day before and on the day in question be perfectly all right.

Mr. Fluharty: All we can do in order to show the influence of this woman is to show what happened when he gets in contact with her. Here a mere phone call.

The Court: Influence in what way? Influencing his health [177] and causing him to have one

(Testimony of Lelia G. Gardner.)

of these incidents at the time of changing his beneficiary? Can you show that? Are you prepared to show she influenced him to the point where he was under one of these spells when he changed his beneficiary?

Mr. Fluharty: No, we don't have that, but we do have this.

The Court: I know, but this isn't related to that.

Mr. Fluharty: Well, I recognize it's largely a matter of discretion with this Court, but, after all, it's the only way we can show the man's state of mind to create the entire picture before or after the event.

Mr. Perillat: I believe they are trying to create a state of mind that did not exist, your Honor.

Mr. Fluharty: We have here a fairly established pattern starting in December, 1942. He has flicker blackouts, and then he gets grand mal seizures. This is merely one more——

The Court: But that kind of a person, when he is not under one of those incidents, can do many things that are perfectly legal. Now, unless you can show that what he did was under the stress of one of these spells or that somebody caused him to get into one of them in order to cause him to do something in their behalf—it's very interesting and it's very pathetic, but it doesn't help us to decide the issues.

Mr. Fluharty: Well, your Honor, of course our contention is it does show it and I have an instruction which I have [178] requested, and there's

(Testimony of Lelia G. Gardner.)

authority for them, that it's not natural for a person to disinherit his children. Those are the prime objects of his bounty. And the only way we can show this whole picture is this evidence, because this is the only evidence we have, and this is one more fact to take into consideration to show the whole picture, before, at, and after. We could have come here, put the testimony of the doctor in that there was nothing wrong with him on April 30, 1951, and we wouldn't have had a true picture. I think this is a matter for the jury to decide. Of course, it's within your discretion, and I'm saying I believe it would be within your sound discretion, to allow this to come in as one more circumstance.

The Court: Could you follow it up and bring it up to April 30, 1951, or thereabouts?

Mr. Fluharty: Well, this ties into the prognosis which we read, and the final report of the discharge from the hospital in December of 1950, which stated, if he had any emotional stress whatsoever, he would have a psychotic break, and we show here from a mere phone call from this woman he goes into a psychotic break where he tries to commit suicide.

The Court: The evidence also is he later married the woman.

Mr. Fluharty: The whole debacle ended in its final and inevitable conclusion, in suicide, tragedy played its way out. [179] That's our point. Of course, you have already taken it out——

The Court: No, I haven't either. You haven't

(Testimony of Lelia G. Gardner.)

made any contention there was any suicide here. Have you got any evidence to that effect, or haven't you?

Mr. Fluharty: I don't see any evidence that is contrary.

The Court: Well, that isn't the point.

Mr. Perillat: Excuse my interrupting—

Mr. Fluharty: Well, the point I am making is—of course, we are out of the presence of the jury—I went to the Secretary of State this morning. He says, as far as they know these records are perfectly competent, and they wouldn't change them if I mandamused them.

The Court: I know the Department have done lots of things that are contrary to law, but that doesn't make it right, but we are past that point. Other than that word by some doctor, who obviously didn't know who violated the law in making an assertion of positive fact distinguished from a probability, other than that, you haven't got a single iota or shred of evidence there was any suicide.

Mr. Fluharty: Just that, yes.

The Court: I think this 1949 thing is too far away to be helpful on any of the issues in this case. It may be perfectly true in 1949 when it happened, I don't doubt that, but, unless you can connect it up with the disputed change of beneficiary on April 30, 1951, more directly than you propose, [180] I can't see where it would help us

(Testimony of Lelia G. Gardner.)

in the slightest. I am going to decline to accept your offer of proof and call the jury back.

Mr. Fluharty: Thank you, your Honor.

(Whereupon the jury returned to the court room.)

The Court: The jury is now present.

The objection of the pending question having been sustained, the offer of proof made in the absence of the jury denied, you may continue.

Mr. Fluharty: Thank you, your Honor.

Q. In October of 1950, did your son visit with you on that particular occasion, some time in October of 1950?

A. 1950? Yes, he came home to me on October the 2nd.

Q. Of 1950? A. 1950.

Q. And he visited with you in your home, is that right, Mrs. Gardner?

A. Well, yes, he arrived at eleven something, and he was very much disturbed.

Q. In the morning or evening?

A. Evening.

Q. 11:00 o'clock in the evening of that day, do you remember? A. I think it was a Tuesday.

Q. About what date?

A. Well, I think it was the 2nd. [181]

Q. October the 2nd, then?

A. Yes, October the 2nd.

Q. And he came home to you in the evening around 11:00 o'clock, and he was disturbed, is that correct? A. Yes, he just——

(Testimony of Lelia G. Gardner.)

Mr. Perillat: To which I request the Court to instruct the witness not to go beyond the scope of the question.

The Court: Yes, just answer the question you have been asked. Don't volunteer any information until it's asked. He was disturbed.

Q. (By Mr. Fluharty): He was disturbed, is that correct? A. Yes.

Q. And did he make any statements to you with respect to his relationship with Mrs. Hester?

A. Well, he said that he——

Q. Just a minute. Just answer the question.

A. Yes.

Q. Did he make a statement? A. Yes.

Q. All right. Now, did he state whether he had just seen Mrs. Hester?

A. Well, he said that some time between 4:00 and 5:00 he had left her.

Q. And he had——

A. At the Dowe Realty Company. [182]

Q. Left where?

A. At the Dowe Realty Company in Palo Alto.

Q. In Palo Alto? A. Yes.

Q. And he told you he had left her about 4:00 o'clock that afternoon?

A. Yes, between 4:00 and 5:00.

Q. Did he make any statement as to why he left there? A. Well——

Mr. Perillat: I object on the basis it is incompetent, irrelevant and immaterial, does not tend to prove any of the issues in this case. Why he left

(Testimony of Lelia G. Gardner.)

to come to Sacramento. It has no bearing on his condition on April 30 of 1951.

Mr. Fluharty: This is a lot closer, your Honor, than the previous one.

The Court: She may answer. Go ahead.

Q. (By Mr. Fluharty): Did he make a statement as to why he left her? A. Well, yes.

Q. Yes, is that correct? A. Yes.

Q. All right. Now, what did he say?

A. He said, "I am in an awful mess." He said, "Mrs. Hester has me under a spell." He said she used hypnotic influence on him. [183]

Q. Did he state anything as to whether he was in fear of her? A. Yes, he did.

Q. What did he say?

A. Well, he was afraid of being poisoned.

Q. And what did he say to you? What was the subject of his conversation.

A. Well, he put his hands—his face in his hands and cried. He said, "Mother, I'm in an awful mess. I have found out they are a dope gang down there." Now, that's what he said, and he cried, and then he prayed. He said, "Oh, God, help me." And he was very nervous, and then he went into the bath room, and I said, "Well, Son, I'll fix you some milk." So I gave him hot milk and put him to bed.

Q. And did he state that he was in fear of her?

Mr. Perillat: I object on the basis it is a leading question.

The Court: Sustained.

Q. (By Mr. Fluharty): What other statement

(Testimony of Lelia G. Gardner.)

did he make to you with respect to his relationship with Mrs. Hester?

A. I got him to bed as soon as possible. He was crying just like a child. I said, "Son, I want to get the doctor for you." He said, "No, mother," and he objected, and I put him into bed and gave him this warm milk, but he thrashed all night. I was in a position where I could see him, just out in the other room where I could look in and see him. He was [184] terribly nervous and upset.

Mr. Perillant: Will the Court entertain a motion to strike the testimony based on the same basis the objection was offered?

The Court: Overruled.

Mr. Fluharty: You may cross examine.

Mr. Perillat: I have no questions.

The Court: You are excused. Next witness.

Mr. Fluharty: At this time, your Honor, the Plaintiff rests.

The Court: Very well.

Mr. Perillat: If it please the Court, at this time I have a motion to make pursuant to rule 50, and it has to be—ask it be made out of the presence of the jury.

The Court: You may make your motion, stating its grounds in the presence of the jury, and, if I need argument, I will excuse the jury to hear you.

Mr. Perillat: Pursuant to Rule 50, I ask this Court for a directed verdict in favor of the defendants, Gardner, Haynes, and against the plaintiffs, Glaser and Gardner, on the following basis; that

there is no evidence whatsoever that has been proved in the Plaintiffs' case to show in the first place any mental incompetency or mental incapacity of the deceased veteran on April 30, 1951. There has been no evidence to show he was subject to any organic brain disease which would be the [185] subject of mental deterioration and a progressive thing from which an inference could be drawn, that there was a continuation of a mental instability. There is no evidence whatsoever before this Court to tend to prove that there was any undue influence exercised by Mrs. Hester—or, rather, Mrs. Gardner or Mrs. Haynes, in the execution of this document on April 30, 1951. The sole evidence in this case is that this man suffered from epilepsy, that in September or October of 1950 he had one psychotic incident in Sacramento, was committed temporarily, was discharged from the Veterans Administration as competent on December 22 of 1950.

The Court: Very well. Is the motion resisted?

Mr. Fluharty: Yes, your Honor.

The Court: Very well. The jury may be excused while I hear argument on motion.

(Whereupon the jury retired from the court room.)

The Court: The jury is not absent. I will hear you in elaboration of your motion.

Mr. Perillat: If the Court please, we are dealing here with the mental competency and capacity of an individual to execute a document, whether it be a will or a contract, on a specific date. There

the law is not only Federal, but our State Law is that you have got to show the mental incapacity at the time that the document was executed.

Speaking of undue influence, you have to even show the [186] undue influence was exercised at the very moment. The fact there was an opportunity for the exercise of undue influence is not sufficient under the law. The law recognizes, however, that in certain types of mental diseases where there is proved objectively a mental deterioration of the brain, where there is a progressive deterioration, once there is established incompetency, then the law will say that that type of a deterioration by act of nature will be presumed to be continued. We do not have that in this case. We have here only the fact that a man suffered from epilepsy. We have the records of the hospitals that treated him for his epilepsy. The record shows that he did have a certain emotional instability along with these epilepsy seizures. The evidence is that this veteran was discharged, and this is the evidence, I may add, that this man was discharged on December 22 of 1950 as competent, and that is in evidence, and it's undisputed. There is no evidence following December 22, 1950, from which any inference could even be drawn that this veteran ever had a subsequent epileptic seizure or ever had a subsequent psychotic break.

There is no presumption of insanity in this case, nor is there a presumption of incompetency. The last evidence is September 22, 1950, as to competency or incompetency of this man, and I say there

is a total failure of proof of incompetency on the date alleged. [187]

The Court: Mr. Fluharty; you wish to be heard?

Mr. Fluharty: Yes. Your Honor, the Complaint is in three causes of action. One cause is there was undue influence, the other was incapably executing a change of beneficiary because of a legal disability, and the third one was he was of unsound mind.

Now, the case of Taylor vs. The United States, and also the case of Brown vs. Emerson, both of these cases are cited for instructions, one for Instruction No. 18 and the other one for Instruction No. 19. I point out that one of the great tests is the natural objects of one's bounty.

Now, the interesting thing here, there is no evidence in this case yet to show that Mrs. Hester is the wife. All she is is the stranger at this time. That's the only evidence. And, of course, as of this date, April 30, 1951, she was not the wife of this decedent. She was not a member of the family circle, and, consequently, we claim this comes under the rule of Brown vs. Emerson.

Now, we have here a case as of the date where we stand on this trial, that a stranger to the person, a stranger who has flitted in and out of this evidence here, Mrs. Hester, we do have evidence of the fact he was afraid of her, ran away from her, but she was part of a gang that was trying to dope him.

That's the evidence, the uncontradicted evidence, to which there was no cross examination made.

And our point is that this [188] falls squarely on Taylor vs. U. S. and Brown vs. Emerson in this stage of the proceeding. It's unnatural to disinherit your two minor children in favor of someone who is a stranger and in favor of her daughter, who is just as old as the person who made the change of beneficiary.

In addition to that, we have had guarded prognosis and, in all likelihood, would suffer a psychotic break. Allowing him to leave the house with Mrs. Hester was the best of a bad situation. So we submit there is sufficient evidence in which to draw the inference because of the unnaturalness of the request at the time of the change on April 30, 1951, that he lacked a necessary testamentary capacity because it is absolutely unnatural to disinherit——

The Court: Well, doesn't a man who has life insurance in which he has reserved for himself the right to change his beneficiary, the right to exercise that right without restrictions?

Mr. Fluharty: Well, counsel has made reference to that. Most of them are off of the angle of vested right. As I understand the rule, as it used to be and still is the rule in many states, if you make a person a beneficiary under the third party contract, they would have an interest in the proceeds, and you couldn't change the beneficiary without their consent. But the cases which I have read in this particular field, pointing out he had a vested interest, [189] pointing out the beneficiary had no vested interest, was done to refute the third party

beneficiary theory and had no idea they had such a vested interest, that they would be entitled to the proceeds, if the person were insane. I think those cases go off on the contractual theory of the third party beneficiary. But that doesn't mean that they have the absolute right to make this change if he's suffering delusions or if he doesn't have the necessary mental capacity.

The Court: Well, you are mixing up things here, aren't you? The proposition for which you have been contending is unrelated to mental condition. You are telling me that where a perfectly sane person who has the right to change the beneficiary so changes it in favor of a stranger and against a member of his family, that that cannot stand?

Mr. Fluharty: No, I'm saying that's one factor along with all the other evidence——

The Court: To show what?

Mr. Fluharty: To show he didn't have a requisite mental capacity because the test is: One, that he must know the nature and extent of the act; Two, the nature and objects of his bounty; and, Three, the nature and extent of his property.

Well, this is one of those three tests, that is, that he—and I'm saying that in accordance with the *Brown vs. Emerson* case, this is the fact to be taken into consideration, the fact it's unreasonable to disinherit your children in favor of [190] a stranger.

The Court: Well, I'm not sure that there is any evidence here that he did disinherit the children.

All I can say is they didn't get this insurance.

Mr. Fluharty: Well, that's the point I am making with respect to the particular insurance. In other words, the cases hold that you apply this testamentary test to the contractual act, in this *Brown vs. Emerson* case it says, "If the proceedings of the will are unjust, unreasonable, and unnatural, the Court may consider that fact as a circumstance in determining the mental capacity of the testator." And that's the case that was cited in *Taylor vs. United States*.

The Court: All right. Supposing you got that. What else have you got?

Mr. Fluharty: Well, we have the prognosis of the Court—I am sorry. Not of the Court, but of the last hospital he was in, pointing out the prognosis was guarded, and there was a good chance for psychotic breaks in the future upon which we could base an inference in this case there was something wrong on this particular day in question.

The Court: What supports that last phrase? The only thing that you showed me was wrong on a date reasonably here in the event in question was October, 1950. I let you put that evidence in on the theory you are beginning there to get close to the event, but you stopped right there. That's all you had. [191] I probably should have stricken it, but I left it in to look at. There's nothing to support he had one of these psychotic breaks on the day in question, is there?

Mr. Fluharty: Of course, we do have the deposition which has been stipulated to.

The Court: It's not in evidence.

Mr. Fluharty: It would show he was under stress on that day.

The Court: It's not in evidence and doesn't show anything. All right. Supposing we proceed. Haven't you anything further?

Mr. Fluharty: No, your Honor.

The Court: All right.

Mr. Perillat: Does your Honor wish a reply to that?

The Court: If you have one to make, I'll hear you.

Mr. Perillat: It appears to me, if the Court please, that counsel is confusing two different rules of law. It is the rule that in considering mental competency, the test is whether or not the testator at the time, the specific time in question, knew the nature and extent of his property. Those who had the first claim upon his bounty, and his relationship towards those people. The law does not say that because your children may have first claim on your bounty that if you leave them out of an insurance policy, that insurance policy designation must be void. And I believe that counsel's [192] argument is directed towards that because this whole case is built on the fact that this man is insane because he left his children out of the designation of beneficiaries of this insurance policy.

Now, as a matter of fact, on the designation of insurance policy of September 14 preceding this one, the children were not mentioned in that design-

nation at all, and that is the designation of beneficiary upon which these people would walk out of court with \$10,000.

Now, the rules, the Federal rules as we have stated before, are not inconstant. I have outlined the Taylor case and all the rest of them, and I am sure the Court is well familiar with the rules of mental competency and the proof which must be adduced to destroy the solemn act of a person such as that in the execution of a deed, will, or any instrument of this nature.

Again, I say there is no evidence of incompetency, and to allow this to go to the jury would be broadest type of speculation and conjecture because there is no evidence, so far in this case as to the condition of this man on the date in question. And, furthermore, there are no presumptions from which an inference could even be drawn.

I should like to read a short resume to the Court which is considered the leading case in California on testamentary capacity. It's the case of Perkins, found in 195 Cal. 699, and there our Supreme Court says: "It is well settled that, upon [193] the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testator at the time of the execution of the will is the question to be determined. The presumption is always that a person is sane and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testator was of unsound mind at the time of the execution of the will."

And I submit there was no evidence in support of that as required by that case.

Thank you, your Honor.

The Court: I am going to grant the motion. There has been a failure of proof here. Call the jury in.

(Whereupon the jury returned to the court room.)

The Court: Let the record show the presence of the Jury.

Ladies and gentlemen of the jury, at the conclusion of the Plaintiff's case, a motion having been made for a directed verdict and argument upon the motion having been had in your absence, it has been the Court's decision and ruling to grant the motion which I now hereby do and direct you to return a verdict against Plaintiffs and in favor of the Defendants for reasons of failure of proof with respect to each of the three causes of action outlined in the Complaint.

The first cause of action alleges the defendant to have been mentally incompetent as decreed by an Order of the Superior Court [194] of California; and, hence it is alleged that at the time of the change of beneficiary on April 30, 1950, the veteran was incompetent to legally change his beneficiary.

The evidence affirmatively shows that the man was never adjudicated insane by any Court, but he was committed for mental illness and thereafter discharged from the hospital as competent. And there is no basis for any presumption that he was at any time mentally incompetent or that any such

presumption, if it ever did exist, continued after he was discharged from the hospital as competent. The mere fact that the man was subject to attacks of epilepsy and may have suffered what they call psychotic breaks during fits of epilepsy, does not, in and of itself, prove in the slightest that he was, on April 30, 1951, the date upon which he changed his beneficiary, under the influence of any one of those psychotic breaks, or in any way mentally incompetent.

It is alleged in another cause of action that he was in fact mentally incompetent. There has been a complete failure of proof in that respect. There has been absolutely no evidence tendered to show that on April 30, 1951, he was mentally incompetent, and legally thus incapacitated from executing a change of beneficiary.

The third cause of action charges the defendants with having exercised undue influence upon the veteran for the purpose of causing him to change the beneficiary previously existing in [195] their favor as of April 30, 1951. Here, again, there has been a complete failure of proof.

Accordingly, for failure of proof as to each of these causes of action, I am directing you to return a verdict against the Plaintiffs and in favor of the defendants. Under Federal law, a veteran possessing Federal insurance as a veteran, has an absolute right to change his beneficiary. The mere fact that he changes it in favor of a stranger and does not direct that the benefits of it flow in favor of some member of his family does not in and of

itself in the slightest indicate that he is insane or mentally incompetent. He may be a so and so for having so done it, but that doesn't mean he's mentally incompetent.

We have had here the brother and sister of this veteran suing in their own individual names, not as guardians of the veteran's children, seeking to have this insurance adjudicated by this action in such a way so *as the* the benefits of it will flow to them.

There has been an effort made, during the course of this litigation, to bring into consideration for the jury things that were irrelevant, which had sympathetic tones, and overtones that were not evidence, which I have excluded, such as the pictures of the little children and the pictures of the family, and so forth, all of which may have been interesting but beside the point as to the validity of this change of beneficiary on April [197] 30, 1951. I have also excluded a great many letters written by the veteran to his brother and sister and to his mother and aunt because, again, they did not bear on the state of his mind as of April 30, 1951. They related to matters years prior when he indicated that he was very fond of his children, and there has been no dispute in this case that he was or was not fond of his children because that was not in issue.

One particular letter was endeavored to be introduced into evidence which would have disclosed, if I allowed it into evidence, that the veteran, in the year which it was written—the particular year I forget at the moment,—I think it's 1950, October

—after visiting his children and his family, mother, brother and sister, expressed satisfaction with the way the children were being cared for; and with respect to the state of the insurance policy at that time, which was in favor of the brother and sister, the plaintiffs herein indicated that he was sure that they would use the money in the event of his death for the benefit of the children. On the basis of that it has been contended here on the basis of legal argument there was a constructive trust created in favor of the children. I am saying this to you largely for the benefit of the Plaintiffs who may not understand some of the legal rulings that have been made, but in the event the case which they made out was proven and a verdict went for them they would be entitled to the insurance money; and, if they [198] failed to discharge their moral obligations to the children, they would be either a moral problem or a trust problem, the subject of litigation aside from this. But the only question in this case was, did this man, this veteran, legally change his beneficiary on April 30, 1951. The act which he did on that date is on its face perfectly valid, and there has been a complete failure of proof, as I have indicated before, of any mental incompetency, either in point of law or fact, and a complete failure of undue influence in effecting this change of beneficiary; therefore, the act of this deceased must stand as perfectly valid. I therefore have directed you to return a verdict as indicated against the Plaintiffs and in

favor of the defendants. And Mr. Clerk, what is the custom in this jurisdiction, to have them execute such a verdict?

The Clerk: I think it is, your Honor.

The Court: I will call a short recess and have you prepare one for the signature and I will designate the first lady in the first row as the foreman to sign the verdict at the direction of the Court and in compliance with direction. After it has been recorded the parties may no longer record any exceptions they wish to take to my direction. We will take a short recess.

(Recess.)

The Court: Very well. Note the presence of the jury and— [198] Lost my chart. I can't think of your name. Oh, there it is—Having designated Mrs. Spencer as the Foreman to execute the verdict directed by the Court, I will ask you, Mr. Clerk, to give her the form which says, "We, the jury, find in favor of the defendants as we have been directed by the Court," and if you will give her the facility for signing it—— [200]

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[Endorsed]: Filed Oct. 31, 1957.

[Endorsed]: No. 15789. United States Court of Appeals for the Ninth Circuit. Helen May Gardner Glaser and George R. Gardner, Appellants, vs. Frances Shenk Hester, also known as Frances Shenk Hester Gardner and Willane Hester Haynes, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: November 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

